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UNIVERSITY OF ALBERTA

REVOLTING JUDICIAL BEHAVIOUR? THE EUROPEAN COURT OF JUSTICE

BY

STEPHEN W. HADLEY

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

FACULTY OF LAW
EDMONTON, ALBERTA
SPRING 1991

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ABSTRACT

The European Court of Justice is the court of the three communities which are collectively known as the European Community; the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community. It is a quasi-federal court one of the main functions of which is to adjudicate on the relationship between European law and the domestic law of the member states and, therefore, to delimit the respective competences of the European and national political and legal institutions.

The European Court has been criticised on the grounds that it is not a neutral forum for the resolution of legal disputes, but, in its decisions, acts upon its own policy preference in favour of increasing the power and influence of the European Community at the expense of the member states. It stands accused of unacceptable judicial activism.

This thesis examines this accusation. It considers the political genesis of the Community and the historical reasons for the impetus towards European integration, along with the strategic, economic and political objectives of the founders of the Community. It describes the institutional system set up by the three Treaties and the place and function of the European court within that system.

The Constitutional principles that the European Court has established and which have been the main targets for the accusation of activism, the supremacy of Community law over national law and the doctrine of direct effect, are examined, together with the reactions of the national courts which, in many cases, are responsible for applying the European Court's rulings. Particular attention is given to cases in which national courts appear to have defied or obstructed the European court and to the means by which national courts have accommodated European law into their domestic constitutional systems. The approach of the United Kingdom courts is examined in detail as the United Kingdom is the only member state without a written constitution and, as a common law country, is less familiar than other member states with the techniques of hierarchical constitutional adjudication.

Finally, an assessment is made as to whether or not the accusation of unacceptable judicial activism is warranted in the light of the role of the European judge in the Community system.

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1. THE CHARGE OF JUDICIAL ACTIVISM

> [The European Court of Justice] went well beyond the textual stipulations of that Article leaving behind it a variety of well-merited, legal-interpretative principles.
>
> To many a European lawyer this is revolting judicial behaviour.[1]

The European Court of Justice ("ECJ") is the judicial organ of the three European Communities, the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom) set up in the 1950s. The primary objective of the Communities was to integrate the economies of the member states under the control of a supra-national body to prevent a repeat of the two European conflicts which escalated to such an extent that they are now referred to as the World Wars. A secondary objective was, through the removal of trade barriers, economic integration and harmonisation of policy, to increase the efficiency of the European economy and, as a result, to increase the living standards and prosperity of all of the inhabitants of the member states of the Communities.

The first objective has been achieved. It is now inconceivable that armed conflict could break out between two or more member states, and the disintegration of the Soviet block suggests that a third war anywhere in Europe is no longer a real threat.

Now that the strategic objects of the Communities have been achieved the economic objectives have come to the fore. A vast body of European legislation, which is intended to have effects in all of the member states, has been, and is being, produced by the institutions set up by the Treaties. It has been left to the ECJ to determine how that legislation is to take effect and to expound the relationship between European law and the national law of each member state. As the competence of the Community has grown, and the amount of European legislation has increased, the potential for conflict within the overlapping European and national legal systems has also grown, and the ECJ has been called upon to adjudicate and define the relative and competing competences of the Communities and their members and to explore the legal effects of membership of the Communities on national institutions and practices.

There is no doubt that the ECJ's jurisprudence has tended to favour the Communities and has helped to further the influence of the Communities and the integration of all aspects of European life, which has occurred to such an extent that the three Communities are no longer viewed as separate entities within separate spheres but are referred to as the European Community (EC), an all-embracing term which demonstrates the reality that the EC is no longer concerned only with energy, coal and steel and economic matters. The result is that the ECJ has been accused of unacceptable judicial activism, of usurping the functions of national legislatures by pursuing its own policy, rather than simply interpreting and applying the policy agreed at the Community level by member states and expressed in the Treaties and European secondary legislation.

This charge of illegitimate judicial activism will be examined by considering the political history of the establishment and development of the Communities; the institutional structure (unique in the international sphere) set up by the Treaties; the ECJ'S "integrationist" jurisprudence, which has led to the criticism, and the reaction of the national courts of the member states to Community law as expounded by the ECJ, with particular reference to the U.K. The "unwritten" constitution of the U.K. allows for no hierarchy of statutes and, as a result, its legal establishment is less familiar with the kind of constitutional adjudication undertaken by the ECJ than that of member states with a written constitution which stands as a superior legal norm by which all other legal norms must be measured.

Finally, an attempt will be made to explore the role of the judge in the Community setting in the light of the Communities' political and legal history to assess the validity of the charge of an unacceptable pursuit of policy at the expense of legal legitimacy.

ENDNOTES - CHAPTER 1

1. H. Rasmussen. On Law and Policy in the European Court of Justice (1986), at 12.

2. HISTORY

2.1 The Birth of the European Communities

The history of Europe is punctuated by attempts by individual leaders and states to unite the continent through conquest. The idea of union through agreement, cooperation and integration is comparatively novel. After World War I the League of Nations failed to produce a lasting peace, demonstrating that independent nations, as sovereign states, were not prepared to sacrifice self-interest and unilateral action in favour of collective interests and concerted action.

World War II indicated to many people that the concept of the independent Nation State was the root cause of international conflict and suffering. The goals of peace and prosperity could only be attained by close cooperation and integration between countries at all levels and in all spheres. It was the various Resistance movements, possibly the last groups which might have been expected to think in terms of reconciliation with Germany, which expounded this vision of post-war Europe most clearly. Typical is the declaration of the Committee of National Liberation in Algiers, August 1943:

> There will be no peace in Europe if states re-establish themselves on the basis of National sovereignty with all that implies by way of prestige politics and economic protectionism ... The countries of Europe are too small to give their people the prosperity that is now attainable and therefore necessary. They need wider markets ... To enjoy the prosperity and social progress that are essential, the states of Europe must form a federation or a "European entity" which will make them a single economic unit.[1]

The immediate post-war years saw an enthusiastic and continuing dialogue between European countries concerning cooperation and integration. Churchill, in a speech at Zurich in 1946, called for a "kind of United States of Europe".[2] Many of the proposals produced by these discussions foundered but their relevance should not be underestimated. The general political climate and the personal relations between officials which developed provided a continuing impetus for the exploration of areas in which European cooperation and integration could be achieved. The failures indicate the socio/political boundaries beyond which individual nations were not prepared to restrict their freedom of action for the common good. These limits, both at a consensus and individual state level, mirror the spectrum of attitudes, to both objectives and methods, which have been (and are still) present throughout the process of European integration.

At the end of World War II Europe was devastated. The social and economic cost of reconstruction would be high. At the same time an opportunity to create new political structures presented itself. It seemed clear that international cooperation and conciliation were a pre-requisite to a continuing peace in Europe. At the same time where, and with whom, political control of the rebuilding process should be located was unclear. The recreation of individual nation states risked a repetition of past mistakes and future conflict in an era where warfare entailed catastrophic effects countrywide, rather than being conducted primarily at defined fronts and borders. Complete federalism would necessitate the creation of new supra-national political bodies which would direct and control European integration, imposing harmonization and cooperation from on high. These bodies would force potentially insurmountable problems of popular nationalism (particularly in Britain which had "won" the war). Between these two extremes were a range of increased consultation and cooperation agreements and schemes to transcend the nation state in particular spheres, involving a limited transfer of sovereignty to supra-national bodies.[3] International political initiatives tend to be promoted by governmental elites and need continuously renewed political impetus. An alternative (or complementary) approach was offered by those who believed in economic determinism.[4] Economic arrangements between countries could have sufficient impact on society to achieve lasting peace and prosperity.

For those who were committed to maintaining the nation state as the basic unit of international persona[5] a Free Trade Area[6] would lead to stability and prosperity. Cooperation would lead to the solution of common problems but the integrity of the individual nation state would not be affected. Economic (neo)functionalists urged the creation of supra-national agencies with decision-making powers in the economic sphere. The authority of such agencies would expand and gain a momentum of its own, encouraging the integration process, as political and other pressure groups shift their attention towards the supra-national body. This would lead over time, and at a pace governed by the perceived legitimacy of and compliance with the decisions of the new body, to increased harmonization of economic policy and increased integration in the social and political spheres as the autonomy of the nation state was undermined by the supra-national body.

These differing approaches to a perceived common objective of peace and prosperity are important. Crucial actors enter and leave the European stage, particularly where domestic governments are concerned. Officials change jobs, governments change and a new attitude towards Europe may be taken by a member state overnight. This attitude will be dictated by the preferences of the new actors for political as contrasted with economic determinism and nationalism as contrasted with European federalism.[7] For our purposes a federalist government, frustrated by political inertia within the Community, may be more tolerant of an activist ECJ in its efforts to promote integration than a nationalist government, concerned primarily with maintaining its own area of sovereignty.

In general, European organizations have tended to be set up with grandiose objectives suggesting a federalist approach, but the detail of treaties and procedural rules, combined with the nationalistic attitudes of certain participants, lead to a reality involving the minimal transgression of national sovereignty.

2.2 **BENELUX**[8]

The small central countries of Europe had been experimenting with various forms of internal economic arrangements. The customs frontier between Belgium and Luxembourg was abolished on May 1, 1922 and the union expanded to include the Netherlands in 1927. After an interruption caused by

World War II a common external tariff was introduced in 1948. The Benelux experiment was a great success and it is clear that, in terms of economic policy, Benelux provided the model on which the EEC was later to be based.

2.3 OEEC/OECD and the Council of Europe

The institutional arenas of the conflict between nationalist and minimalist factions were the Organization for European Economic Cooperation (OEEC) and the Council of Europe. It was the attitude of the British, the one nation in a position to take, if she so chose, a leadership role and who moreover organised the distribution mechanism for American aid, which ensured that as engines of integration these organizations were a failure:

> The Marshall plan represented the one chance for Europe to unite. If the American government had seen through the false European spirit of the British and had granted the aid contingent on the creation of political federal institutions on the continent, we would now have European union ... The money which the Americans thought they were giving to help the Europeans to overcome economic Nationalism served only to reconstitute the old national economies instead of creating one market and one European economy.[9]

The OEEC[10] was the body set up to coordinate the aid provided by the 1947 U.S. Marshall plan. Stalin declined an invitation to participate, characterising the aid as U.S. economic imperialism. General Marshall made it clear that aid was contingent on European cooperation on social, political and economic reconstruction:

> Our policy is not directed against any country or against any doctrine but against hunger, poverty, despair and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist ... The programme should be a joint one, agreed to by a number, if not all, of European nations.[11]

The controlling body of the OEEC was not supranational but consisted of a Council of Ministers which had to act unanimously. This requirement provided each member state with an effective veto and so ensured that domestic and nationalistic interests would prevail. The OEEC survived the Marshall plan, it did succeed in setting up the European Payments Union to encourage inter-European trade. However, its inability to take any action opposed by a single member state was a major drawback. In 1961 it became a world-wide advisory body, the Organization for Economic Cooperation and Development (OECD).[12]

While the OEEC was the preferred vehicle of the proponents of economic determinism, the Council of Europe was to be the driving force behind political integration.[13] The

Council consisted of a public Consultative Assembly, with delegates from National Parliaments, and a Committee of Ministers, meeting in private, where unanimity was required.

The Hague Congress of 1948 which formed the springboard for the setting up of the Council of Europe stated in Article 3 of its resolutions that:

> European Nations must transfer and merge some portion of their sovereign rights so as to secure common political and economic action for the integration and proper development of their common resources.[14]

However, when the Consultative Council, which was set up to negotiate the institutional structure of the Council of Europe, met to consider the powers to be granted to a European Assembly the British, to the consternation of the other countries, proposed that a purely consultative intergovernmental body should be set up, with no surrender of national sovereignty. The final structure of the Council of Europe reflected a compromise between continental Europe, who had even considered setting up an Assembly without Britain, and the extreme nationalism of the British.

As might be expected, despite a Consultative Assembly split upon party rather than national lines, the Council of Europe was rampant with inertia due to the requirement of unanimity in the Committee of Ministers. This ensured that national sovereignty was never threatened, as each state had a veto over all proposals, and national concerns were given priority over European solutions. Although a failure as an instrument of political unification, the Council of Europe does serve as a consultative and advisory body. Its particular success has been the monitoring and enforcement, through the European Court of Human Rights at Strasbourg, of the European Convention on Human Rights and Fundamental Freedoms (ECHR).[15]

2.4 **The European Social Charter**[16]

The Charter, which was signed in 1961 and entered into force in 1965, was a creation of the Council of Europe and was intended to be complementary to the ECHR. The ECHR is concerned with civil and political rights whilst the Charter protects social and economic rights such as the right to work, the right to bargain collectively and the right to social and medical assistance. The weakness of the Charter, in contrast to the ECHR, consists of the lack of a right of individual petition or the adjudication of a court of law. It certainly enjoys a much lower public profile than the ECHR where the decisions of the European Court of Human Rights can create headlines and subsequent political embarrassment for the government found to be in violation of the Convention.

2.5 **NATO**[17]

The North Atlantic Treaty Organization (NATO) provides the framework for military cooperation between Western Europe and North America, against a perceived Soviet threat. At the end of World War II it was clear that neither Britain nor France was capable of assuming the burden of European defence. Attlee, Britain's Prime Minister, manoeuvred the U.S. into committing itself to maintaining a military presence in Europe by withdrawing British troops from the Greek Civil War, raising the possibility of a Communist victory. The U.S. intervened and the Truman Doctrine (1947), an overt challenge to the expansion of Soviet influence, was born. NATO was formed in 1949 and West Germany was permitted to re-arm and join the alliance in 1955.

From the point of view of European integration NATO was a success for the minimalists who wished to recreate the nation states of Europe. It is based on the familiar idea of military cooperation between national forces (although Europe entertains continuing fears that in a crisis the U.S. would act unilaterally, one of the reasons for French withdrawal from NATO in 1966) rather than the creation of Western European forces.

It appeared for a while that a combined force was a genuine possibility. In 1950 the Consultative Assembly of the Council of Europe passed a resolution calling for a European Army by 89 votes to 5. Two months later Plevin, the French Prime Minister, proposed a plan for such an army. Britain refused to relinquish control over any portion of her military forces but France, West Germany and the Benelux countries signed a provisional treaty in 1952 to create a European Defence Community (EDC).[18] The potential command problems and the necessity for a coordinated foreign policy were obvious and the Dutch proposed a solution which would have been a large step towards federalism, a European Political Community (EPC) legitimated by a directly elected European Parliament. The French, the initiators of the EDC scheme, back-pedalled and in 1954 refused to ratify the Treaty. This allowed Britain to step in and negotiate the re-arming of West Germany through membership in NATO against the traditional background of military cooperation rather than the pooling of resources and the setting up of a supra-national army.

2.6 The European Coal and Steel Community (ECSC)

Once the British attitude towards political integration had become clear, the federalists turned to economic integration as an alternative. This had the advantage that British participation, although desirable, was not essential. If a primary objective was the maintenance of peace in Europe the obvious candidates for some form of international control were the coal and steel industries. These provided the raw materials of military might and supra-national control of such basic resources would make it difficult, it not impossible, for one country to sustain a military build-up of sufficient magnitude to be a threat to peace. At the time, tension was increasing between West Germany and France over the Saar, a coal-rich area claimed by both, and the ECSC was seen as a means of reducing the economic importance of the dispute to each country.[19]

The architect of the ECSC was Jean Monnet, a committed federalist and the Commissaire-Général of the Plan for the Modernization and Equipment of France. The driving force behind it was Robert Schuman, the French Foreign Minister. The key to the plan was the creation of a High Authority, a supra-national body which would have sole control over the production and distribution of coal and steel. This would necessitate an explicit, albeit limited, transfer of sovereignty from the member states to the new body.

The proposal was kept secret even from most of the French Cabinet until a Cabinet meeting on May 9, 1950 was interrupted for Schuman to take a telephone call from Konrad Adenauer, Chancellor of the German Federal Republic, who gave final confirmation that West Germany would cooperate with the plan. Schuman felt that the secrecy was necessary to deny factions within the French coalition cabinet the opportunity to coordinate effective opposition to the plan. The British reaction was suspicion and hostility. The idea of any Franco/German alliance without the knowledge or consultation of Britain suggested that Britain was the target of the alliance. In a sense this was the case. The innovation of the ECSC was the element of supra-nationalism and Britain had consistently watered down any such proposals into some form of cooperation agreement with a national veto. As a result it was made a pre-condition of participation in the discussions concerning the mechanics and membership of the ECSC that countries accept a genuine pooling of resources sufficient to make war "materially impossible" and that the decisions of the High Authority would be binding. Italy and the Benelux countries found this unobjectionable; Britain, unsurprisingly, did not.

Both major political parties in Britain opposed participation for a variety of reasons. Britain's coal and steel industries were healthy and her connections with the U.S. and the Commonwealth were still more important than links with Europe. Ultimately, Britain was not prepared to enter into any form of negotiations where the major bone of contention, the accountability and control of the High Authority, was non-negotiable; particularly when important economic decisions would be removed from Parliamentary supervision:

> We will allow no supra-national authority to put large masses of our people out of work in Durham, in the Midlands, in South Wales and in Scotland.[20]

In Paris on April 18, 1951, six nations - the Benelux states, Italy, Germany and France - signed the ECSC Treaty, placing the coal and steel resources and production of each country under the control of a supra-national High Authority with Jean Monnet as President. The potential for supra-nationalism as a means towards European unity was clear. Adenauer, addressing the first ECSC Council of Ministers meeting made the choice explicit:

> The Council stands at the crossroads of two kinds of sovereignty, national and supra-national. Whilst it must safeguard the National interests of member states it must not regard this as its paramount task. Its paramount task is to promote the

> interests of the Community; and unless it does so the Community will not develop.[21]

The High Authority was the major decision-making body and it would be assisted by an independent panel drawn from producers, workers, consumers and dealers known as the Consultative Committee.[23] The High Authority is accountable on an annual basis to an Assembly, representing the peoples of the member states, which has a power of censure over it.[24] The input of National governments is channelled through the Council which consists of government representatives.[25] The Court of Justice was established to ensure that the Treaty was complied with and to provide a neutral forum for dispute resolution.[26]

The crucial power balance is between the High Authority and the Council, the supra-national body and the partisan domestic representatives. The Council normally acts by a variety of specified majorities, but unanimity is usually required to overturn a decision of the High Authority.[27] This means that the individual member state governments have no veto over High Authority action but can veto Council action if they support the supra-national body.

2.7 **EEC and Euratom**

After the failure of the proposals for the EDC and EPC, the Benelux countries initiated discussions aimed at economic integration over a wider field than the ECSC. Britain was involved in the initial talks, although through junior representatives rather than at ministerial level, but it became clear that there was a major disagreement over the raison d'être of the proposed Community. The ECSC members favoured a Community modelled on the ECSC with institutions with the potential to achieve a high level of economic and political integration. Britain, as usual, rejected supranationalism and produced plans for a free trade area. As this was unacceptable to the six, Britain withdrew from the negotiations.

The talks were also concerned with further cooperation in the energy field through the creation of the European Atomic Energy Community (Euratom) to allow the development of a European nuclear industry under supra-national control. France was dubious about the EEC but enthusiastic about Euratom, which was used as a carrot to obtain French cooperation. France saw Euratom as a means of sharing the cost of nuclear research and reducing the lead in nuclear technology, peaceful and military, which Britain had established through her "special relationship" with the U.S. The negotiations were long and difficult but succeeded ultimately because the negotiators believed in what they were attempting to achieve and so were prepared to recognise the political and economic problems faced by their counterparts:

> Fortunately, the chiefs of the delegations did not consider themselves as adversaries. They had the conviction that they were working for the same cause. The difficulties of one were the difficulties of all.[28]

The Treaty of Rome, which set up the EEC, was signed on March 27, 1957 and despite some alarms, was ratified by all six Parliaments. The Euratom Treaty was signed in Brussels on April 17, 1957.

Although each of the three communities operates in a limited sphere there can be no doubt about the ultimate vision of the architects, as extracts from the Preambles show:

> Resolved no substitute for age old rivalries the merging of their essential interests; to create, by establishing an economic Community, the basis for a broader and deeper Community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforth shared.[29]
>
> Determined to lay the foundations of an ever closer union among the peoples of Europe.[30]

Britain was worried by the creation of the EEC and tried to negotiate some form of free trade association between the six and the other members of the Council of Europe, making concessions which, if offered prior to the signing of the Treaty of Rome, might have changed the history of Europe. However, De Gaulle had now come to power in France and confronted with the actuality of the EEC, which he had opposed, was disinclined to allow Britain to obtain any benefits from the EEC without the potential liabilities of supra-nationalism which France had accepted:

> It is apparent to France that it was not possible to form a Free Trade Area as had been wished by the British .... without a Common External Tariff embracing the seventeen countries and without harmonization in the economic and social spheres.[31]

Although France's partners did not approve of her unilateral action, they supported it to maintain unity. Britain responded in 1959 by setting up the European Free Trade Association (EFTA)[32] in industrial goods with Norway, Denmark, Sweden, Switzerland, Austria and Portugal.

Without the minimalist influence of Britain the way seemed clear for the rapid integration of the six EEC members. However, De Gaulle took over the nationalist stance and made it clear that, in his view at least, European supra-nationalism could never amount to federalism and that the ultimate power remained with national governments.

In 1960 the internal trade of the six grew by 30%, compared with a 16% increase in the internal trade of EFTA countries[33] and the decline in Britain's international status led, somewhat reluctantly, to an application for membership. In Parliament, Macmillan stressed the limited nature of an "economic" Community rather than the political consequences which would flow from membership.[34]

To understand the breadth of the potential political implications of the EEC a brief explanation of the possible forms of economic integration is required. Balassa identifies five stages of integration:

> a free trade area, a customs union, a common market, an economic union and complete economic integration. In a free trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against non-members. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with non-member countries. A higher form of economic integration is attained in a common market where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination that was due to dispar-

> ities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social and counter-cyclical policies and requires the setting-up of a supra-national authority whose decisions are binding for the member states.[35]

Although it must be realised that these categories are not sharply delimited and, in particular, that negative integration (the removal of obstacles) and positive integration (the harmonization of policy) can, and must in a mixed economy, occur contemporaneously,[36] the analysis is useful for our purposes. It should also be remembered that all of the member states of the Community, and the Community itself, operate inside the wider international framework of the General Agreement on Tariffs and Trade (GATT)[37]. The GATT attempts to liberalise world trade by use of a "most favoured nation" clause. This places contracting states under an obligation to trade on a basis of non-discrimination between countries by extending to all other contracting states any trade concessions granted by it.[38] Any free trade area or customs union breaches this obligation as it involves granting concessions to other member states which are not extended to non-member GATT signatories. However, such arrangements may facilitate inter-member trade without imposing additional barriers to trade with non-members. In recognition of this, free trade areas and customs unions may be permitted within the GATT structure provided they satisfy criteria laid out in

Article XXIV of the GATT. The general principle of Article XXIV is laid out in paragraph 4:

> (The Contracting parties) recognise that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

This general principle is then followed by a precise set of criteria laid out in paragraphs 5-9. Ambiguities in the drafting of the criteria and uncertainty about the exact relationship between the general and specific provisions make it difficult to establish whether any given regional arrangements fall within the GATT exception. However, the general effect of most of the schemes currently operating has been beneficial to the economies of both members and non-members.[39]

This overall beneficial effect, coupled with generally recognised difficulties in applying Article XXIV and the reliance of the GATT dispute resolution mechanism on negotiation and moral pressure has ensured that the EEC as an organization has suffered no significant ill-effects from its contravention of the GATT.

The free trade area, customs union and common market are underpinned by the theory that the removal of barriers to trade leads to more efficient production and allocation of resources. The removal of distortions in the market allows the concentration of production and resources in the localities which can exploit resources most efficiently and thereby produce at least cost. In a free trade area, with no common external tariff, non-members seek to introduce goods into the area via the member state with the lowest external tariff for the goods in question. This process is known as "deflected trade". It undermines the policy objective of a country with a higher tariff and necessitates the continuance of internal border controls, the details of which will be laid out in the agreement setting up the free trade area and referred to as "rules of origin", to differentiate between goods manufactured in another member state and goods manufactured outside the free trade area which are merely passing through another member state. The customs union, which was the first stage of the EEC,[40] has a common external tariff, allowing any goods present within the territory of the member states to circulate freely, either as having been manufactured there or as having paid the common external tariff at the point of entry. Politically, the free trade area is merely a reciprocal arrangement providing for the identical treatment of imports and domestic goods in exchange for similar privileges for that country's exports to the other contracting parties. There is no restriction on individual state action outside of this simple contractual agreement (although states which are signatories to the GATT will have wider international obligations). In a customs union the restrictions on state action, and thereby the loss of control and sovereignty become more apparent. All external tariffs must be agreed between the member states. Any individual state is no longer free to control her own tariffs irrespective of the attitudes of the other member states. The common market widens the field within which member states may no longer act unilaterally. A common market involves the removal of national restrictions on free trade in goods and services and unimpaired factor movement, including the free flow of labour and capital. The member states become unable to control the flow of workers into their territory or to impose exchange controls as that would restrict capital movement within the common market. Even when (and if) tariff barriers to the free movement of goods and restrictions on factor movement are abolished, many obstacles remain in the way of genuinely free competition. These non-tariff barriers spring from varying domestic policies, employment policy, safety regulations, energy subsidies etc. The EEC is committed to abolishing or controlling all such market distortions.[41] This means that the internal policies of member states, previously political decisions purely the prerogative of national legislatures, must be harmonised. Community policies must be substituted for domestic policies and member states will not be allowed to establish, or maintain, policies which have the effect of distorting the market. National Parliaments lose power, and therefore, sovereignty. Community policies, which obviously contain member state input, but input only and not determination, are set by a central authority. National Parliaments are restricted (or prohibited) in their ability to legislate in areas in which they previously had total autonomy but which are now within the sphere of Community competence.

At first sight De Gaulle and the British would appear to be natural allies in their distrust of supra-nationalism. De Gaulle was attempting to arrange regular policy meetings between the Heads of Government of the member states, which are not provided for in the Treaties and which would inevitably lead to a decline in the importance of the supra-national institutions and decision-making mechanisms. However, a major concern for De Gaulle was the maintenance of the dominant position of France within the Community. It was not possible that Britain could enter the EEC without the existing Franco/German power axis being seriously affected. De Gaulle insisted that the negotiations concerning British entry and Commonwealth agricultural preferences be conducted after a common EEC position had been established on every question, rather than as negotiations between seven governments working towards a common goal. This ensured that only slow progress could be made and De Gaulle had plenty of time to consider options and external political factors. In the end it is probable that Britain's entry was prevented by political factors which were never explicitly acknowledged let alone present on the negotiating table. Britain's nuclear defence links with the U.S. and, in particular, the Nassau meetings between Kennedy and Macmillan in December 1962, convinced De Gaulle that Britain should not be allowed into the EEC. It was impossible for Britain to face in two directions at once, integrating her economy with Europe and her defence policy with the U.S. (which, as shown by the Cuban missile crisis, would act unilaterally when threatened); not only would French influence in the EEC be diluted but American influence, through Britain, would be increased.

Under Article 237 of the EEC Treaty the Council of Ministers[42], the domestic governments' political representatives in the Community, must act unanimously when dealing with an application for membership. The French exercised their veto on British membership at a press conference held on January 14, 1963. It not only caused short-term tension between the six but arguably initiated a major retreat into a nationalistic approach by all member states, not merely because of the veto but also because of the attitude and presentation of the decision by the French:

> With a brutality without equal in the history of the European Community, manifesting utter scorn for those with whom he was negotiating, allies or adversaries, he stopped the negotiations which he had undertaken in complete agreement with his partners, while invoking pretexts whose brittleness was only too obvious .... Never more could the confidence and the spirit of cooperation which had prevailed during the early years exist in the same way.[43]

In the next few years some progress was made despite the concession for concession tactics which prevailed rather than the prior "a problem for one is a problem for all" approach. Some agricultural problems were resolved and in 1965 the Merger Treaty brought about the fusion of the institutions of the three communities. The High Authority, the independent controlling body of the ECSC, merged with the initiating bodies of the EEC and Euratom, to form a single Commission and a single Council of member states representatives was created.[44]

In 1965, Walter Hallstein, the President of the Commission pushed a package through the Commission which involved the completion of the farm pricing system, the direct financing of the Community through levies on imports, rather than through national contributions, and greater control of the Community budget by the Assembly. It was hoped that France would be prepared to accept the financial changes in order to achieve a common pricing structure for agricultural products, which would be of immediate benefit to France. However, independent financing for the Community would inevitably strengthen the supra-national institutions and increase the influence of the Commission and Parliament; in particular a single member state would no longer be able to veto financial proposals which were supported by both the Assembly and the Commission. The negotiations were deadlocked in the Council of Ministers when the time-limit set for agreement was reached. In similar situations the Community had previously adopted a "stop the clock" fiction allowing negotiations to continue to a conclusion after the deadline had passed. The French Foreign Minister, the incumbent President of the Council, refused to allow the meeting to continue. The French then announced that they would boycott all Community meetings of an innovative rather than a routine nature.

2.7.1 **The Luxembourg Accords**

After five months of inertia, with the other members keeping the Community alive but on life support, a compromise was reached. De Gaulle's main objections concerned the increasing use of majority voting in the Council and the proposed increase in the power of the Commission:

> If "this embryonic technocracy, for the most part foreign" was allowed to grow in strength "France would be exposed to the possibility of being overruled in any economic matter whatsoever and therefore, in social and sometimes political matters."[45]

The result of private meetings in Luxembourg in January 1966 was the "Luxembourg Accords", which were basically an agreement to disagree.[46] The relevant paragraphs read:

> a) Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.
>
> b) With regard to the foregoing paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.
>
> c) The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.
>
> d) The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure.[47]

The Accords constitute a de facto amendment of the Treaties and their constitutional validity is suspect. The ECJ has held that for amendments to the Treaties to be effective the amendment procedure laid out in Article 236 of the EEC Treaty, must be followed.[48] However, there is no doubt that, politically, this gentleman's agreement has had a stultifying effect on the Community.

The Commission has been vocal in its insistence that the Accords should be abandoned[49] and in 1974 the Heads of Government of the member states declared that, "It is necessary to renounce the practice which consists of making agreements on all questions conditional on the unanimous consent of the member states."[50] Member states have become more willing to abstain, allowing proposals to pass rather than exercising a veto[51] and in 1982 a British attempt to exercise a veto on farm prices was overruled by the other Council members.[52] The precise justifications for the rejection of the veto are unclear, but Britain had agreed to the increase in farm prices and appeared to be using her veto as a lever to gain concessions in the concurrent negotiations over a budgetary rebate for the U.K.[53] Subsequently, the veto has been exercised successfully by Germany and has been threatened by Ireland.[54] The use, or disuse, of the Accords following the Single

European Act[55] will have profound implications for the future progress of the Community.

2.7.2 The First Enlargement

In 1967 the British Labour Government, its fears about the lack of effective national control of the Community having been reduced by the Luxembourg Accords, applied again for membership. De Gaulle again exercised his veto, although later private talks between France and Britain about the conversion, with British assistance, of the common market into merely another form of free trade area suggested that British membership was becoming a more attractive proposition to him.[56] In May 1969 De Gaulle resigned, which opened the way for a new application for British membership, particularly as Edward Heath, an ardent European who had led the British negotiating team in 1962, had been elected Prime Minister in June 1970.

In 1972 Britain joined the EEC, accepting the Treaty of Rome in its entirety (although entry conditions were renegotiated the following year). Membership was confirmed in a national referendum and the Treaties were incorporated into domestic law by the European Communities Act 1972. Denmark, Ireland and Norway also joined but Norway, surprisingly, withdrew after a referendum. The six had become the nine.

2.7.3 **New Growth**

Greece joined the Community in 1981 and Spain and Portugal in 1986. The reunification of Germany increased the actual size of the Community, if not the number of members. Austria, Malta and Turkey have applied for membership of the Community, although Turkish membership is opposed by Greece, supported by other member states' unhappiness with human rights in Turkey and the quality of Turkish "democracy".57 The EEC is now clearly the largest trading unit in the world.[58]

Progress towards political integration has not moved as far or as fast as the founding fathers may have hoped. Certainly it is too early to suggest that an entirely new European Federation has evolved. However growth, in the sense of enlargement, continues and the words of the French Foreign Minister, summing up the advantages of the EEC, may yet, with the Single European Act moving the member nations a small step closer to European union[59], prove prophetic:

> We are at the start of our action. We won't ever regard it as ended as long as there remains one free city of Europe outside our Community.[60]

2.8 **Overview**

The purpose of this rapid look at post-war European relations and the early years of the Communities has been to highlight facts and attitudes which exert a continuing influence over the Community. The major impetus came from an elite group of European federalists who desired a higher degree of integration than that represented by the Communities. The final form of the Communities represented an acceptance of the political reality of popular nationalism, but with a perception that as the economies of the member states were harmonised and integrated this would have a direct impact on the social and political lives of the member states. This, in turn, would lead to an ongoing progress towards political integration. After the setting up of the EEC the political climate changed, notably in France, but with a spill-over effect in other countries, in favour of national rather than Community perspectives on problems. A major criticism of the European Court of Justice has been that it has, when faced with inertia in the political organs of the Community, taken it upon itself to promote the vision of the founding fathers regardless of the changed political climate in which the Community operates. It thereby risks losing the compliance of the EC members with Community law, legislative or judicial, upon which the process of integration ultimately depends.

The creation of the Communities was the result of the efforts of political and technical elites. The ECSC was sprung upon the French Cabinet and the rest of Europe only after basic agreements had been reached. Today, despite the pervasive influence of the Community, its direct inputs into the national systems of its members are on taxes, tariffs and company and national policy. The effects of decisions taken by European technocrats and the ECJ are felt indirectly with little popular understanding of their origins. This raises questions of accountability and legitimacy. Direct elections to the European Parliament took place in 1979, twenty-seven years after they had been provided for in the ECSC Treaty, Article 21(3). This may merely demonstrate the reluctance of national governments to transfer any perceived democratic political legitimacy to institutions independent of national parliaments. However, many of the ECJ's most integrationist decisions were rendered prior to 1979. Their constitutional validity, if they are perceived to exceed the parameters established by the Treaties (and the perception of national governments and the public may be more important than the view of legal academics), may be more difficult to establish as the legislation upon which those decisions were made lacked (except where the issue was one of Treaty interpretation) the legitimacy provided by a directly elected Parliament.

ENDNOTES - CHAPTER 2

1. Quoted in R.B. Jones, The Making of Contemporary Europe (1980), at 13.

2. Quoted in R.C. Mowat, Creating the European Community (1973), at 26. See also Jones, *supra*, n.1, chapter 1. Article 1 of the Council of Europe (*infra* 2.3) states the aim "to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."

3. *Infra*, 2.2 - 2.7.

4. See D. Mitrany, A Working Peace System (1946). E. Haas, The Uniting of Europe (1958).
   The suggestion is not that politics and economics are separable but functionalist (Mitrany) and neo-functionalist (Haas) theories represent a difference in emphasis - economics from the bottom up rather than politics from the top down.

5. Notably the British. Churchill made it clear that his "United States of Europe" did not include Britain. Her links with the Commonwealth and the U.S. could not be replaced by links with Europe.

6. *Infra*, 2.7.

7. This is the categorization adopted by L. Lindberg and S. Scheingold, Europe's Would-be Polity (1970).

8. See F.G. Eyck, The Benelux Countries (1959). Secretariat-General of the Benelux Customs Union, Report on the Ministerial Discussions between the Netherlands, Belgium and Luxembourg, 1949. Jones, *supra*, n.1, at 11.

9. A. Spinelli, "The Growth of the European Movement since World War II" in European Integration (1957), C.G. Haines ed., at 54.
   The point to note is the placing of blame for the failure of European Union upon the British, a belief which led to continuing distrust of British motives in later years. Integration through economic blackmail is not recommended.

10. G.B.T.S. 28 (1948).
    See M. Quin, The OEEC and the Common Market (1958).

11. Speech at Harvard, June 5, 1947. Quoted in G. Marcel, Un Changement d'Esperance (1958).

12. G.B.T.S. 21 (1962).
See OECD - The Organization for Economic Cooperation and Development (Paris 1963).
OECD has 22 members who are mainly first world industrial nations.

13. (1949) Eur. T.S. 1; 87 U.N.T.S. 103.
See A.H. Robertson, The Council of Europe: Its Structure Functions and Achievements (1956).

14. Quoted in Jones, supra, n.1, at 19.

15. (1950) Eur. T.S.; 213 U.N.T.S. 221.
See P.V. Dijik, The Theory and Practice of the European Convention on Human Rights (1984); The Council of Europe, Stock-Taking on the European Convention on Human Rights: The First 30 years, 1954-84, (1984); F. Dowrick, "The Council of Europe: Juristic Activity 1974-86." (1987), 36 I.C.L.Q. 633 and 878.

16. G.B.T.S. 38 (1965); 529 U.N.T.S. 89.
See D. Harris, The European Social Charter (1984).

17. G.B.T.S. 56 (1949); 34 U.N.T.S. 243.

18. See Mowat, supra, n.2, chapter 13.

19. The signing of the Treaty by West Germany was conditional on an exchange of letters confirming that the status of the Saar was still unresolved.

20. Harold Macmillan at a Council of Europe meeting in Strasbourg, August, 1950. Quoted in Jones, supra, n.1, at 55.

21. Quoted in Jones, supra, n.1, at 56.

22. ECSC, Articles 8-17. For a more detailed discussion of all of the Community Institutions see infra, chapter 3.

23. ECSC, Articles 18-19.

24. ECSC, Article 24.

25. ECSC, Articles 26-29.

26. ECSC, Articles 31-45.

27. e.g. ECSC, Articles 57 and 59.

28. P.H. Spaak, Combats Inachevés (1969).

29. Preamble, ECSC.

30. Preamble, EEC.

31. Jaques Soustelle, French Minister of Information to the British Negotiating Committee. L'Année Politique (1958), at 482.

32. G.B.T.S. No. 30 (1960); 370 U.N.T.S. 3.
V. Curzon-Price, The Essentials of Economic Integration: Lessons of EFTA Experience (1974).
J.S. Lambrinidis, The Structure, Function and Law of a Free Trade Area; The European Free Trade Association (1965).
The current members of EFTA are Austria, Finland, Iceland, Norway, Sweden and Switzerland.

33. H.C. Deb., Vol. 640, Col. 1388.

34. H.C. Deb., Vol. 645, Col. 1490.

35. B. Balassa, The Theory of Economic Integration (1962), at 2.

36. See J. Pelkmans "The Institutional Economics of European Integration" in Integration Through Law, M. Cappelletti et al., eds., Vol.1, Book 1, at 324.

37. Reproduced in Simmons, K.R. and Hill, B.H.W. Law and Practice Under the GATT, (1988).
See Hilf, M. et al. The European Community and GATT, (1986). Lortie, P. Economic Integration and the Law of GATT, (1975).

38. GATT, Article I.

39. See Lortie, supra, n. 37, at 166.

40. EEC, Article 9.

41. EEC, Article 2.

42. See infra, 3.2, for the role of the Council within the Institutional Structure of the Communities.

43. J. Newhouse, De Gaulle and the Anglo-Saxons (1970), at 82.

44. See infra, chapter 3, for a discussion of the Community Institutions.

45. July 9, 1965. Quoted in M. Camps, European Unification in the Sixties (1967), at 81.

46. Bull. EC 3-1966, at 8.

47. Id. See also S. Henig, "The European Community's Bicephalous Political Authority" in Institutions and Policies of the European Community, J. Lodge, ed. (1983), at 15.

48. Case 59/75, Publico Ministero v Manghera [1976] ECR 91. Case 43/75, Defrenne v Sabena [1978] ECR 1365.

49. E.g. Second General Report on the Activities of the European Communities (1969), at 14, et seq. Bull. EC Supp 9/69 at 33-34. Bull. EC Supp 4/72, chapters 3 and 7.

50. Eighth General Report on the Activities of the European Communities (1975), at 298.

51. See E. Noel, The European Community: How it Works (1979), at 29.

52. The Times, May 20, 1982. Which in a leader described the rejection of the veto as the greatest crisis faced by the EC since the Accords were implemented.

53. See W. Nicholl, "The Luxembourg Compromise" (1984-85), 22 J.C.M.S. 35, at 40.
H.C. Deb., Vol. 96, Col. 320.

54. The Times, May 13, 1985.
The Times, July 16, 1986.

55. See infra, 3.2

56. Mowat supra, n.2, at 201.

57. The Observer, Editorial, November 11, 1987. "No Case for a Blackball".

58. The EC accounts for approximately 15% of world trade. In 1985 (with ten rather than twelve members and a divided Germany) EC exports were valued at U.S.$ 614.4 billion. EC imports totalled U.S.$ 625.1

	Exports	Imports
	(Billion U.S.$)	
Canada 1986	87.1	79.2
Japan 1985	175.6	129.5
U.S.A. 1985	213.1	361.6

U.S. figures taken from Whitaker's Almanac, 1988, all other figures taken from Countries of the World and their Leaders Yearbook, 1988.

59. See *infra*, 3.2

60. J.O. (Débats Assemblée) July 6, 1957, at 3374.

3. STRUCTURE

3.1 The Political Institutions of the Communities[1]

The structure and procedures of the institutions of the Communities are laid out in their constituent Treaties. The ECSC Treaty established as the major policy institutions a High Authority, an Assembly, a Council and a Court.[2] When the EEC Treaty was signed it was agreed that the three Communities should have a common Assembly and Court[3] although a separate Commission and Council were set up.[4] In 1965 the Merger Treaty completed the unification of the Community institutions by fusing the Councils and the Commissions/High Authority.[5] Necessary adjustments have been made upon each accession and the current position will be described, although changes introduced by the Single European Act 1986 (SEA) will be dealt with separately.[6]

3.1.1 The Commission[7]

The Commission consists of seventeen members and acts by a simple majority. Each member state has one commissioner and may not have more than two. Although technically the commissioners are appointed by agreement between the governments of the member states, in practice each government appoints its own choice. A commissioner's term of office is four years and may be renewed. Each commissioner is a representative of the Community and independent of their appointing government. They are specifically prohibited from seeking or taking instructions from any government and the member states are prohibited from seeking to influence the commissioners in any way.[8]

3.1.1.1 The Role of the Commission

The Commission's role within the Treaty structure is qualitatively different in the ECSC Treaty as compared with the EEC/Euratom Treaties. The Commission is the legislative body of the ECSC, whereas the Council is the legislative body of the EEC/Euratom. In the discussions which led to the setting up of the ECSC it was intended that the only control over the High Authority (now the Commission) was to be through the censure of the Assembly (now the European Parliament). Then, on a Dutch initiative, the Council, an organ designed to represent the governments of the member states, was included.[9]

Under the EEC/Euratom Treaties the Commission has a number of functions.[10] It is the initiator of legislation; the standard phrase used in the Treaties is "the Council .... acting on a proposal from the Commission."[11] It follows from this that the task of identifying areas where legislation is needed, of researching possible approaches and drafting the legislation falls on the Commission. The Commission exercises wide powers delegated from the Council in the implementation of Council decisions, acting effectively as an executive body. The Commission is also the watchdog body of the Communities, ensuring that member states comply with Community legislation and their obligations under the Treaties. Under EEC Article 169 the Commission, if it deems a member state to be in breach of her Community obligations, can attempt to persuade an offending state to comply and may bring an action before the ECJ in pursuit of this objective.

3.1.2 **The Council**[12]

The Council consists of representatives of member state governments. It is often referred to as the Council of Ministers and is the main legislative body of the EC. Each country is represented at meetings by the government minister responsible for the topic under discussion, usually this involves either the Finance or the Agriculture Ministers. A sophisticated voting system is laid down in the Treaties, which differs according to the requirements of the Treaty article under which a power is being exercised. This may specify a simple majority, unanimity, or a qualified majority. If a qualified majority is required, the vote of the minister of each country is weighted. Fifty-four votes, out of a possible seventy-six, are needed to act on a proposal from the Commission and fifty-four votes from at least eight countries are required in other cases.[13] Obviously, the Luxembourg Accords have, on occasion, negated the specific Treaty provisions as to voting requirements.

The Council must usually act upon a proposal from the Commission. It can accept or reject a Commission proposal but can only amend it by unanimous vote.[14] The result is that draft proposals pass back and forth between the Commission and Council and when agreement is close, a commissioner will attend a Council meeting to negotiate and amend the proposal during the meeting until a compromise acceptable to both emerges. Although the Commission acts collectively, in practice each commissioner has an area of specialization and will be authorised to amend common proposals in the area of his/her portfolio on behalf of the Commission when attending council meetings.[15] Under Article 152 of the EEC Treaty, the Council can direct the Commission to submit proposals on particular subjects but, unless unanimous, will be unable to dictate the final form of the resulting proposal to a Commission which dislikes the option favoured by the Council.

3.1.2.1 **COREPER**[16]

Each country has a staff of officials designed as a support network for a minister about to attend a Council meeting. These networks are collectively known as the Committee of Permanent Representatives (COREPER). This body constitutes the embassy of each member state to the EEC and conducts day-to-day negotiations with the Commission and other member states as to the material which will be submitted to the Council.

When the Council meets its agenda is divided into "A" and "B" items, depending on the level of agreement which has been reached at preliminary meetings between the Commission, national officials and COREPER. Each minister will be briefed by their COREPER members who will place the proposals in both a Community and domestic context, fulfilling their role as information brokers, liaising between national administrations and Community institutions. The "A" items are usually disposed of quickly and the "B" items are those where real distance still exists between the positions adopted by member states.

The Council meetings are chaired by the minister of the country currently holding the Presidency and are attended by a commissioner. The commissioner plays an important role, not only in an official capacity as the only person entitled to amend a proposal during the meeting, but also as a Community representative visibly independent from domestic political considerations in a way the current chair of the meeting cannot be. The commissioner's status as a mediator and conciliator between member states is thereby enhanced.

3.1.3 **The European Parliament**[17]

The Assembly of the Treaties adopted the title of the European Parliament in 1962. All of the Treaties contained an Article instructing the initial Assembly (delegates from member states' parliaments) and the Council to draw up proposals for "elections by direct universal suffrage"[18], but it was not until 1979 - twenty-eight years after the signing of the ECSC Treaty - that the first direct elections took place. The Parliament consists of five-hundred and eighteen representatives (MEPs), with this number distributed between member states approximately in accordance with their population, although some adjustments have been made to avoid the smaller countries having inadequate representation.[19] Although the Treaties provide for a uniform election procedure[20] this has not yet been established. While most countries use some form of proportional representation, the U.K. (excluding Northern Ireland) uses her normal first-past-the-post electoral system. The MEPs sit in party, rather than national alignments. There are currently nine groupings, the Socialists (one hundred and eighty seats) and the European Peoples Party, or Christian Democrats, (one hundred and twenty-one seats) are the largest.[21]

The constituencies of the political institutions are clear. The Commission represents the interests of the Community, the Council represents the interests of the governments of the member states and the European Parliament represents, "the peoples of the states brought together in the Community."[22] However, given its position as the only directly democratic institution, the European Parliament exerts less control over the actions of the Commission and Council than might be expected. Its main function, even after the 1986 Single European Act. (SEA)[23], is as an advisory, supervisory and consultative body.[24] It has ultimate power over the Commission in that if a motion of censure is passed by a two-thirds majority of votes, involving a majority of MEPs, the Commission must resign as a body.[25] This power has never been exercised and in the event that it should be, the governments are free to reappoint the existing commissioners. This suggests that the power of censure is an empty one if the Commission has the support of the Council. In fact the

Commission and the European Parliament tend to share a common "European" perspective and are more likely to be ranged together against the Council, representing domestic interests, than against each other.

The European Parliament has the power to reject the proposed Community budget[26], a power it exercised in 1979 and 1984. If a budget is not approved, the Community operates on a monthly basis, with a twelfth of the previous years' budget until a new formula is agreed upon.[27]

These controls, although potentially having far-reaching effects, are internal administrative checks. It is the limited role of the European Parliament in the creation and approval of legislation, the normal role of a parliament, which, particularly prior to the Single European Act[28], reveals its weakness. Before the SEA, the European Parliament had a right to be consulted over major policy proposals by the Council.[29] The ECJ has held that failure to consult when required by the Treaties is sufficient to annul a legislative act on procedural grounds.[30] However, a right of consultation, which may lead to a full parliamentary debate, does not encompass all legislative decisions[31] and does not entail any right to be listened to. When final decisions were being made, the Council and Commission were free to ignore any input from the European Parliament.

3.1.4 The European Council

This is the political institution which receives the greatest media coverage and, therefore, has the highest public profile. It is not to be confused with the Council of the EC[32] or the Council of Europe.[33] Its decisions have the most far-reaching effects and yet it is not an institution established by the Treaties. In 1974, in an attempt to improve political cooperation at the highest level, the heads of government of the member states agreed to meet, along with their foreign ministers, three times each year.[34] These summits are known as meetings of the European Council. They range widely over a variety of topics and are not confined to Community issues. Although, when discussing Community business, the European Council can be seen as the ultimate manifestation of the Council of Ministers, there is no doubt that the existence and influence of the European Council undermines the power structure established by the Treaties.

In 1975 Jean Monnet commented that:

> We were wrong in 1952 to think that Europe would be built with the High Authority of the Coal and Steel Community as a supra-national government. What matters now is that the heads of national governments meet together regularly in the European Council. That's where the authority is. It's a very big change.[35]

The public opposition of a government leader to a particular Community policy, an opposition which may be dictated by domestic political factors, may make pursuit of that policy more difficult than the opposition of a Minister in the comparatively low-profile setting of a Council of Ministers meeting. Conversely, if the European Council does reach an agreement on a Community matter, the Community institutions and procedures are bypassed. The Commission, Council and European Parliament may influence implementation but their influence on the content of the policy itself disappears.

The European Council represents a significant shift in political authority away from the Community and towards member states' governments. It is possible, of course, that in the future a European Council might utilise its wider authority to provide the political impetus for greater integration than could be achieved within the framework of the Treaties. From this perspective the blurring of the demarcation lines between Community issues and a coordinated

Community approach to international problems outside the express Community sphere is to be welcomed.

3.2 The Single European Act[36] and 1992

> Moved by the will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform relations as a whole among their states into a European Union ....
>
> Convinced that the European idea, the results achieved in the fields of economic integration and political cooperation, and the need for new developments correspond to the wishes of the democratic peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression ...
>
> Determined to improve the economic and social situation by extending common policies and pursuing new objectives and to ensure a smoother functioning of the Communities by enabling the institutions to exercise their powers under conditions most in keeping with Community interests.[37]

The potentially far-reaching effects of this updating of the treaties caused constitutional crises in Denmark and Ireland[38] Lord Denning said, "In my opinion our sovereignty - the sovereignty of the Queen in Parliament - is seriously eroded by this Bill which is now before this House".[39] However, the actual implications of the details of the document are less radical than the controversy generated and the expansive phrases of the Preamble would suggest.

The Single European Act (SEA) entered into force, after ratification by all twelve national parliaments, on July 1, 1987. The SEA is the result of a number of pressures for a renewed impetus for European integration and increased legitimacy in Community decision-making. The Commission presented a white paper called Completing the Internal Market in June 1985[40], but acknowledged that such an objective could only be achieved if the decision-making process could be accelerated, particularly at Council level.[41] The delays caused by the Luxembourg Accords and Treaty provisions requiring unanimity - the House of Lords Select Committee commented that a better recipe for inertia was hard to conceive[42] - had led to a backlog of draft legislation. Secondly, the European Parliament, now directly elected and increasingly frustrated by its lack of legislative power, had adopted a radical Draft Treaty on European Union[43] in February 1984, which proposed co-legislative power for itself and the Council.

The new Treaty addresses four major areas with the object of making, "concrete progress towards European Unity."[44]

a) The role of the European Council and "European Political Cooperation" is formalized and brought within the Community framework, although not within

Community decision-making procedures. The Council and European Council will determine foreign policy (if agreement can be reached), assisted by a commissioner and with advisory input from the European Parliament.[45] This is basically a codification of existing practice;

b) A deadline of December 31, 1992 is set for the creation of the internal market, an area, "without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty";[46]

c) New provisions dealing with areas such as regional policy, environmental issues and health and safety at work, which were not specifically addressed in the Treaties, are introduced;[47]

d) Some institutional changes were made. These include provisions providing for extended use of qualified majority voting in the Council[48], the establishment of a court of first instance[49] and an increase in the influence of the European Parliament over proposed legislation.[50]

If the 1992 deadline is to be met, the streamlining of decision-making attempted in the SEA must operate in practice. Majority voting in the Council is not an innovation although its extension to new areas, recognising that a unanimity requirement designed for six is unrealistic when dealing with twelve, is to be applauded. However, more important will be the status and application of the Luxembourg Accords. Ominously, the then British Foreign Secretary, Sir Geoffrey Howe, stated in the House of Commons that, "as a last resort the Luxembourg compromise remains in place untouched and unaffected"[51] by the SEA. If majority or qualified majority voting does not, in fact, operate in the Council the extension of this procedure will be irrelevant, regardless of how many Treaty provisions call for it.

The European Parliament wanted a co-legislative role - it received a cooperation procedure to replace one of consultation. Whilst this does increase the influence of the European Parliament, the final decisions remain with the Council. The SEA adds an additional stage to the procedure whereby draft legislation is adopted.[52] On a proposal from the Commission and after consultation with the European Parliament the Council, by a qualified majority, adopts a "common position" which is re-submitted to the European Parliament. If the European Parliament rejects this position the Council may only adopt it unanimously. According to the SEA if the European Parliament accepts the Council's common position, or three months pass without action from the European Parliament, the Council must legislate in accordance with its common position. However, this is not universally accepted in the Council and it is unlikely that any dispute would be resolved by the ECJ rather than within the Council. If the European Parliament votes for amendments to the common position, the Commission must re-examine the proposal and resubmit it to the Council. The Council may adopt the re-examined proposal by a qualified majority or, if unanimous, accept any amendments suggested by the European Parliament which were rejected by the Commission.

The net effect of these changes is that the European Parliament can block a Commission proposal where it has the support of one member state. If it has the support of the Commission it can prevent measures being blocked by a country or countries who cannot muster a sufficient minority vote; however, this may make member states more reluctant to support measures at the initial stage as that would be equivalent to total acceptance if the European Parliament accepts the proposal. Although the European Parliament can now have an impact on the internal workings of the Council, dictating the support necessary for legislation to be adopted (subject to the invocation of the Luxembourg Accords), it still has an internal and negative, rather than positive, impact on the creation and adoption of legislation.

The SEA introduces time limits for stages of the legislative process. The failure to observe these deadlines may, in the European Parliament, cause a proposal to pass to the next stage or, in the Council, to fall. Whilst intended to ensure rapid decisions on legislative proposals and prevent a backlog of Council work, these time limits weaken the European Parliament by removing the tactic of delay from its armoury. They also, for the first time, allow proposals to fall, which means that they must be re-introduced if they are to be adopted in the future. In view of the complexity of some of the legislation placed before the Council a three month limit may be difficult to adhere to. In any event it makes delay by member states in the Council a very potent weapon.

It seems that whenever competence appears to be transferred away from member states, individual Council members are given or retain ultimate power to reject any initiatives:

> It is difficult to avoid the conclusion that the SEA is little more than a charter to safeguard and

> protect national interests in the face of pressures for greater EC action in new and old areas.[53]

3.3 The European Court of Justice (ECJ)[54]

> The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.[55]

In defining the function of the Court this provision could be viewed as merely declaratory. However, the task of the Court is not restricted to ensuring compliance with the Treaty but with "the law", which clearly allows the invocation of a wider legal context within which Community law is located. Judge Pescatore (now retired) has pointed out that the English version, although authentic, is an inadequate translation. His suggested alternative, "ensuring observance of the rule of law", conveys more accurately the essentially supervisory nature of the role of the ECJ.[56]

The ECJ consists of thirteen judges assisted by six Advocates General.[57] The Court sits in plenary session or in chambers of three. The judges and Advocates General are appointed by "common accord of the Governments of the Member States" (in reality, as with commissioners, a member state's nominee is never rejected) for renewable six year terms.[58] They can be drawn either from those eligible to be appointed to "the highest judicial offices in their respective countries or who are jurisconsults of recognized competence."[59]

Each judge is sworn to secrecy on the judicial deliberations[60] and the decisions are collegiate with no dissenting judgments permitted. The style of judgments is continental and, in comparison with common law judgments, terse in the extreme. A short statement of the facts of the case is followed by a summary of the submissions made to the court by various interested parties. The law is briefly stated along with the reasons for the decision. The facts, the law and the rationale behind the decision are connected assertively, as if no other result was conceivable, rather than in the argumentative, conversational style adopted by the common law judge. Previous case law is rarely cited, although extracts from previous judgments may be reproduced verbatim without acknowledgement.[61] The collegiate nature of the judgment and its terse style may make it difficult or even impossible to identify the compromises made between judges with differing views. The judgment itself may, as a result, appear tentative and a coherent rationale be difficult to extract, the language itself may be, "simply oracular and almost apocryphal."[62]

The Advocate General is a legal advisor to the court independent of the parties. The opinions of the Advocate General are published with the Court's judgment and in many cases provide a clearer picture of the reasons for the eventual decision than the judgment itself.[63] The Advocate General is responsible for drawing together all the legal and factual threads which may help the court reach a decision in a concise and impartial manner. It is the Advocate General, not the Court, who will discuss the previous jurisprudence of the court and, where relevant, of national courts. The opinion of the Advocate General will range widely over the facts, the existing case law, the future implications of the present case and a final recommendation as to the decision which should be rendered and why. The Court is not bound to follow the advice of the Advocate General[64] but, particularly in cases where the Court and the Advocate General agree but also where they differ, their opinions do have a substantial effect on Community law. They provide a more general indication of the implications of particular decisions and the direction and rationale of the Court's jurisprudence as a whole than the final decision. It is from the opinion of the Advocate General that practitioners may best be able to advise their clients of the current state of Community law and, when before the ECJ, lawyers will cite Advocate General's opinions as well as Court decisions.

The actual procedure followed when a case is before the Court is governed by a combination of provisions in the Treaties, the Statutes of the Court and the Court Rules of Procedure.[65] Although Article 18 of the Statute of the Court provides for a two-stage process: a written stage and an oral stage, an enquiry stage may be included.[66] The litigation resembles French judicial process and is controlled by the Court rather than the parties.

When a requête (the initial complaint)[67] is received it is assigned to a "reporting judge" (juge-rapporteur) who will guide the case through the Court.[68] The defendant has one month to submit a defence[69], to which the plaintiff may reply and the defendant make a final rejoinder.[70] The reporting judge and the Advocate General assigned to the case will then each deliver an opinion on the need for an enquiry stage.[71] If the Court decides such a stage is necessary it will consist of the oral examination of witnesses, requests for further information, inspection of real evidence and the inspection of documentary evidence as necessary.[72] The Court and the Advocate General conduct the examination of witnesses although they may allow representatives of the parties to ask questions. At the end of the enquiry stage the parties submit further written observations on the material produced during that stage. The reporting judge reports prior to the oral stage. The report will summarize the facts, the background to the case and the evidence presented during the written and enquiry stages. The oral stage most closely resembles an English trial. It consists of oral argument between the parties' lawyers about the relevant facts and law. The Court and the Advocate General will ask questions of counsel during the argument[73] and the procedure will be concluded by counsel making closing speeches. There is then usually an adjournment before the Advocate General delivers his/her opinion. This is read in open court and is technically the final event in the oral stage[74]. The Advocate General's opinion cannot be challenged or commented upon by the parties.

There is no binding precedent in the ECJ. The Court is free to depart from its own previous decisions without explanation. In practice, of course, the requirements of basic justice, consistency and coherence in the law ensure that direct overruling, rather than refinement or restriction of the scope of previous decisions, is the exception rather than the rule.[75] The ECJ is the ultimate legal authority where Community law is concerned. An ECJ decision can only be overturned by an amendment of the Treaties, a practical impossibility on such an issue. This implies that the flexibility to adapt jurisprudence to changed circumstances, new social conditions or simply to the fact that a previous decision appears to be wrong, must be an attribute of the Court, because such adjustments as become desirable cannot be made by legislative intervention.

3.3.1 The Jurisdiction of the ECJ

The circumstances in which a case can be brought before the ECJ, and by whom, are laid out in the Treaties.[76] Apart from the major Treaty jurisdictions to be discussed in detail there are a number of less important areas in which the ECJ has jurisdiction. These include actions for damages against the Community itself in cases of non-contractual liability[77], actions concerning the European Investment Bank[78], contractual disputes where Community contracts contain an arbitration clause[79] and any dispute between member states concerning the Treaties submitted to it by agreement.[80] The new court of first instance set up under the SEA will take on some of these functions. In particular, it will deal with disputes concerning challenges to certain acts of the Community in respect of competition, the Coal and Steel Community, the non-contractual liability of the Community and staff cases[81], which have taken up a disproportionate amount of court time in the past. No new jurisdiction is created and the proposed court is specifically excluded from cases brought by member states, Community institutions or references from national courts under Article 177.[82]

3.3.2 The Article 169 Jurisdiction

This article allows the Commission to initiate litigation against any member state which, after a consultation procedure, it considers to be in breach of her Treaty obligations.[83] In the early years of the Community the Commission was reluctant to proceed by litigation and tended to attempt to negotiate solutions or ignore breaches.[84] Since the mid-seventies the Commission, due to changes in personnel and unfavourable comments from the ECJ[85], has become more willing to censure member states via litigation. The Commission has an extremely high success rate in such litigation[86] and because the threat of litigation is now a real one, member states often attempt to reach out-of-court agreements with the Commission.[87]

3.3.3 The Article 170 Jurisdiction

This is the provision allowing direct actions between member states for breaches of the Treaty. For both procedural and political reasons it is rarely used.[88] The procedural requirements of the article ensure that the first stage of the dispute is channelled through the Commission.[89] If the complaining state obtains a favourable reaction from the Commission it may prefer to try to persuade the Commission to bring an Article 169 action. If the support of the Commission is not forthcoming, that will strengthen the position of the defendant state and the plaintiff state may prefer to negotiate a solution rather than press the litigation.[90]

On a political level, direct action against a member state is a hostile act particularly as all member states, to some extent, inhabit glass houses. The whole ethos of the Community as regards relations between members, is one of cooperation rather than coercion, to ignore that runs the risk of dividing the Community and creating political and legislative stagnation as progress depends upon the consent, freely given, of the member states. It is for this reason that the major political crises within the Community are rarely resolved through litigation. The strict legal position must occasionally give way to political realities as Judge Donner explained when commenting on the 1965 French boycott:

> People have regretted that in last year's differences between France and it partners, the legal implications of the French absence in the Council were never submitted to the Court. That is much too legalistic an approach; it would have been the definite end of the Communities as Communities

> if the opposing parties had gone to law and asked a ruling on details that were no more than the juridical top of a political iceberg.[91]

3.3.4 **The Article 173 Jurisdiction**

This article concerns the review by the Court of binding legal acts of the Council and Commission. A member state, the Council, the Commission and individuals to whom the act is of "direct and individual concern" have the standing to institute an action. Article 173 states that an act may be attacked and declared void on grounds of "lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." The case must be instituted within two months of the plaintiff having knowledge of the act[92], although this time limit will not apply if the issue arises in later proceedings.[93] If the challenged act is a regulation[94] then the ECJ has a discretion to sever appropriate clauses, declaring parts of the regulation void and other parts valid.[95]

Although Article 173 provides private parties with an opportunity to supervise Community acts the ECJ has, in contrast to its attitude towards private supervision of the actions of the member states[96], interpreted the standing requirements strictly and thus restricted direct private access to the Court.[97] It is clear that the ECJ has a policy preference against acting as a court of first instance and towards acting as a kind of appeal court for private plaintiffs, dealing with questions of law on an appropriate Article 177 reference only.[98]

3.3.5 **The Article 175 Jurisdiction**

This article is the negative counterpart to Article 173. The Council and Commission can be brought before the Court by the member states, the "other institutions of the Community" or individuals with the requisite interest, for a failure to act when under a Treaty obligation to do so. This is the only provision which allows the European Parliament to initiate an action before the Court although the absence of any explicit reference to the Parliament has caused some doubt that such a power was intended.[99] The article represents a recognition that inaction and delay can have consequences as serious as a wrongful positive act. However, consistent with its policy of denying individuals direct access to the ECJ to challenge Community institutions, the ECJ has held that any response from an institution is sufficient to "define its position" and so forestall an Article 175 challenge.[100] Although, legally, that position applies to other Community institutions and member states, not just private plaintiffs, the political realities of the Community ensure that institutional and member state concerns are addressed more thoroughly.

3.3.6 **The Article 177 Jurisdiction**

This article has provided the ECJ with the vehicle for many of its most far-reaching decisions. It sets out the framework for judicial cooperation and dialogue between national courts and the ECJ. It is worth exploring in detail and repeating in full:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community;
>
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The Article 177 jurisdiction is, at least in theory, restricted to the interpretation and validity of Community law. It does not refer to national law and it does not define the relationship between national and Community law. It is a procedure for references to be made to the ECJ, when a question of Community law arises in domestic litigation, to discover what the Community law means. The decision guides the referring court but does not determine the case, merely the question referred. It can be likened to uncontroverted evidence of foreign law. Any court or tribunal, illustrating that access to Article 177 was intended to be readily available, may make a reference, but final judicial or quasi-judicial bodies where there is no further domestic appeal possible, are under an obligation to make a reference. The reasoning behind this article seems clear; if there is to be no discrimination between entities affected by Community law then that law must be uniformly interpreted throughout the entire territory of the Community. Yet Community law itself presents a number of obstacles to this. It is published in nine official languages, each of which provides an equally authentic version. Unavoidable semantic differences may emerge which may necessitate detailed comparison of the various texts. The member states all have varying legal traditions and interpretative techniques. The same facts and texts might easily lead to different results depending on the legal culture in which the Community norm is being applied. The solution to such problems was to vest in a central, specialist court, the ECJ, the power to determine, in the light of specific questions from national courts, the meaning of Community law. Once this had been done, the national court, with the aid of the definitive ruling on the Community law question, would be free to decide the case before it without the risk of creating a distortion within the Community by misinterpreting Community law. The object of Article 177 is to achieve an interpretation of Community law which is consistent throughout the Community.

However, the effects and potential of the article have been substantially increased by an extension of the logic which required the article in the first place. The Treaties do not set out the relationship between national and Community law. This was left to the ECJ. The objects of the EEC include the elimination of distortion and discrimination in the market between goods, services, capital and workers originating anywhere in the Community.[101] That objective is not threatened merely by differing interpretation of Community law by national courts but also by the application of existing national law which is in conflict with Community law.

Therefore, in any conflict between national and Community law, Community law must prevail.[102]

The result of this is that national judges are asking for rulings on the interpretation of Community law, the object of which is to establish whether a domestic law is contrary to Community law. The ECJ attempts to avoid answering this question directly. Article 177 is quite clear that the ECJ has jurisdiction to pronounce on questions of the interpretation of Community law only and it is for the national judge to apply domestic or Community law in the light of the interpretation of the ECJ:

> The question had the aim .... of obtaining a judgment upon the conformity of a national law with the Treaty .... A decision would be given not upon the Italian law in relation to the Treaty, but upon the interpretation of the Articles mentioned above in connection with the problems raised by the Milan Judge.[103]

The interpretation given by the ECJ is binding on the referring court and, in practice, that can transform the demarcation between interpretation and application into a distinction without a difference:

> Sometimes what the Court says makes the result so obvious that the line between ruling in abstract and ruling on the result of the case is a fine one. The principle, however, is universally accepted.[104]

The Article 177 procedure leaves the national courts with a discretion, both as to if and when to make a reference and in the application of the interpretation given by the ECJ. The ECJ must, therefore, acquire and keep the cooperation and support of the national courts. It cannot afford to be perceived by them as acting illegitimately. The fact that Community law is applied by domestic courts, albeit acting in tandem with the ECJ, increases the authority of Community law and reduces the potential for political or popular attacks on the ECJ as a distant "foreign" entity.

The ECJ clearly has a policy preference for encouraging individual access to the court indirectly via Article 177 rather than through the direct access provisions.[105] It is under Article 177 that it has explored and defined the relationship between domestic and Community authorities and between domestic and Community law. This definition and delimitation of areas of competence is the means by which member state governments and Parliaments may have their areas of sovereignty protected or restricted. In fact, the abstract nature of Article 177 decisions contributes to this function in that they invariably have potential consequences which transcend the fact-focused determination of the domestic litigation. It is in recognition of this that all member states, and not just the country where the reference originated, have an opportunity to submit observations to the court on any Article 177 reference. All Article 177 references are notified to the Commission, all member states and the Council (if the reference concerns a Council act) who have two months in which to communicate their opinions and attitudes to the Court.[106] The short time limit means that submissions are usually drafted by administrative departments and, although presented as legal arguments, serve to describe the views of the member states upon the proper relationship between the Community and national spheres of competence rather than objective evaluations of the Community law on the subject.[107] The Court is not, of course, bound by these submissions but they do represent an opportunity for member states to explain and justify legislation which may conflict with Community law and to have a degree of input into the only decisions made within the Community which are not subject to political supervision or formulated in accordance with the consensus and compromise explored within the political institutions.

3.4 The Political Culture of the Community

When reviewing the institutional structure of the Community some important considerations appear. Although the effects of Community decisions on domestic policies are obvious, the effect on Community policies and progress of domestic politics should not be underestimated. The Community has twelve member states all of whom hold regular elections. The result of an election may be that the attitude of a member state government to particular EC policies, and even to the Community itself, undergoes a complete reversal. Similarly, faced with a piece of Community legislation which is likely to have a high and unpopular domestic profile, the attitude of the same government may be very different depending on whether there is an election pending or if they have recently been returned to power, thereby being in a much stronger domestic position to support unpopular Community measures.

Further, the personalities and attitudes towards the EC of major actors, particularly the heads of government of the member states, can have an important bearing on progress at policy meetings. It is no secret that Margaret Thatcher, Helmut Kohl and Francois Mitterand shared little common ground, personally or politically, (or that Mrs. Thatcher would have liked to have seen Jaques Chirac returned to power in 1988).[108] Mrs. Thatcher's retirement and her replacement by John Major, who is more pro-European and less confrontational in style, may have a significant impact because the agreement of at least two of France, Germany, and Britain is a necessity for even minor policy decisions.

The public perception of the Community in each country is governed by the domestic political needs of that country. Italians generally support the Community, not only because they are a net recipient of Community funds but also because the EC provides a continuity and stability which is lacking in their domestic political system.[109] Britons are less supportive, as evidenced by the wave of apathy which sweeps the country for European elections[110], not only due to nationalistic tendencies but also because national politicians have a habit of taking credit for EC achievements and then shifting the blame to the EC when measures prove unpopular.[111]

The political structure of the EC is unique. In particular, it does not lend itself to a separation of powers analysis. The elected body has no legislative power and legislation is dependent on the agreement/consent of two bodies, the Commission and the Council, which may have widely differing priorities and concerns. Neither of these bodies, as institutions, is in any sense directly mandated by, representative of, or accountable to, the people. Commissioners are government appointments and represent the Community. Ministers meeting in the Council are government, not Parliamentary, representatives. Community legislation is not subject to the scrutiny or approval of national Parliaments.

The ECJ, when it reviews Community legislation is not, therefore, exercising judicial review in the traditional sense. The totality of the Community political process is such that the major objection to judicial review of legislation, that it usurps a function which belongs to directly elected representatives of the people (the EC had no such body until 1979), is inapplicable. However, when it exercises its jurisdiction under Article 177 to effectively invalidate national legislation which conflicts with Community law, the ECJ is giving primacy to Community law, which is not democratically adopted at any point in its history, over national law which was democratically validated by a national Parliament.

The EC has been enlarged three times. On these occasions not only was the text of the Treaties available for close scrutiny by prospective member states but so was the jurisprudence of the ECJ. To the extent that current decisions constitute merely a logical application of Community jurisprudence which existed prior to the accession of any state then that state can have no legitimate complaint about judicial activity. However, that does not imply (contrary to Lord Mackenzie Stuart[112]) that an accession offers existing member states an opportunity to overturn ECJ jurisprudence they dislike, and that a failure to do so constitutes an implied acceptance by the existing member states of the legitimacy of that case law. Such a reversal would require the unanimous consent of all member states which, for any given decision, is unlikely to be forthcoming as there would undoubtedly have been states who benefitted from the ruling or, favouring further integration, did not object to the ECJ being the actual vehicle.

Given the practical constraints upon the achievement of unanimous agreement between twelve governments plus necessary ratification procedures to amend the Treaties[113], the inviolability of the ECJ becomes clear. It can annul acts of the political institutions of the Community, including acts intended to overturn an ECJ decision. It can, in practice, invalidate domestic legislation. The member states cannot control the ECJ they can only defy it, and deliberate defiance, being itself a breach of the Treaty[114], risks the collapse of the Community as a whole.

ENDNOTES - CHAPTER 3

1. This chapter, as usual, will concentrate on the EEC. Descriptions and references to the ECSC and Euratom will only appear where there are material differences.

2. ECSC, Article 7. A consultative committee involving producers, workers, consumers and dealers was attached to the High Authority, ECSC, Article 18.

3. Convention on Certain Institutions Common to the European Communities, Articles 1-4.

4. EEC Articles 145-163.

5. Treaty establishing a Single Council and a Single Commission of the European Communities. Signed at Brussels, April 8, 1965. Reported in (1965), 4 ILM 776.

6. See *infra*, 3.2

7. Taken from EEC, Articles 155-163, as amended.

8. A desire to be reappointed may affect a commissioner's actions. However, see R. Owen in "Snarling and Snoozing to 1992", *The Times*, February 27, 1988, where he suggested that Lord Cockfield, a former Conservative Minister, had "clashed with Mrs. Thatcher so often he is most unlikely to be renominated by London", a prediction which proved to be correct.

9. H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986), at 203.

10. EEC, Article 155; Euratom, Article 124.

11. E.g. EEC, Article 75; ECSC, Article 31; Euratom, Article 7.

12. Taken from EEC, Articles 145-154, as amended.

13. EEC, Article 148 and Euratom, Article 118, as amended by Article 14 of the Treaty of Accession of Spain and Portugal.

14. EEC, Article 149, as amended.

15. Réglement Intérieure de la Commission OJ, January 31, 1963, Article 27.

16. The existing arrangement of support networks was formalized in the Merger Treaty, Article 4 See E. Noel, "The Committee of Permanent Representatives", (1967), 5 J.C.M.S. 219.

17. Taken from EEC, Articles 137-144, as amended.

18. ECSC, Article 21; EEC, Article 138; Euratom, Article 108.

19. Article 2 of the Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage, annexed to the Council decision of September 20, 1976 (OJ No. L278, October 8, 1976, at 1), as amended by Article 10 of the Treaty of Accession of Spain and Portugal.

20. Supra, n. 18.

21. The European Parliament, One Parliament for Twelve (11th Ed., 1989).

22. EEC, Article 137.

23. See infra, 3.2.

24. Supra, n. 22.

25. EEC, Article 144.

26. EEC, Article 203(8), as amended by the Treaty Amending Certain Financial Provisions, Article 12.

27. EEC, Article 204, as amended.

28. Infra, 3.2.

29. E.g. EEC, Article 87.

30. Cases 138-9/79, Roquette Fieres v Council [1980] ECR 3333.

31. E.g. EEC, Article 55.

32. I.e. The Council of Ministers, Supra, 3.1.2.

33. Supra, 2.3.

34. R.B. Jones, The Making of Contemporary Europe (1980), at 68.

35. Quoted in Jones, id, at 67.

36. This is treated separately as its effects in practice are, as yet, unclear.

37. SEA, Bull. EC., Supp. 2/86, Preamble.

38. Supra, n. 8.

39. H.L. Deb., 1986, Vol. 479, Col. 1056.

40. COM (85) 310 final.

41. The "Vredling Directive" may take ten years from initiation to implementation, including a period of three years from submission to the Council to a FIRST reading in the Council. The fifth Directive on Company Law may take sixteen years from initiation to implementation. Commissioner Ivor Richard Q.C., "The Decision Making Process in the European Community". The Fourth Lord Fletcher Lecture, (1982).

42. H.L. Select Committee on the European Communities, 14th Report, HL 226, 1984-85, at XX.

43. See Caporti, Hilf, et al. The European Union Treaty (1986); J. Lodge, "Some Problems of the Draft Treaty on European Union." (1984), 9 E.L. Rev. 387.

44. SEA, Article 1.

45. SEA, Article 30.

46. EEC, Article 8A, added by SEA, Article 13.

47. EEC, as amended by SEA, Articles 20-25.

48. E.g. SEA, Articles 16, 17.

49. E.g. EEC, Article 168A, added by SEA, Article 11.

50. EEC, as amended by SEA, Articles 6-10.

51. H.C. Deb., Vol. 96, Col. 320 (April 23, 1986).

52. EEC, Article 149, as amended by SEA, Article 7.

53. J. Lodge, "The Single European Act: Towards a New Euro-Dynamism?" (1986), 24 J.C.M.S. 203, at 221.

54. EEC, Articles 164-188. The statutes of the court are contained in Protocols attached to each Treaty. The EEC and Euratom statutes are virtually identical but the ECSC statue does contain significant differences. Only the EEC provisions are discussed.

55. EEC, Article 164.

56. P. Pescatore, The Law of Integration (1974), at 74 n. 12a.

57. EEC, Articles 165-166, as amended by Articles 17-18 of the Treaty of Accession of Spain and Portugal.

58. EEC, Article 167.

59. Id.

60 Statute of the Court, Article 2.

61. See L. N. Brown The Court of Justice of the European Communities (1989), at 46.

62. L. Melville, (1978), 75 L.S. Gaz. 567.

63. For more detail on the role of the Advocate General see A. Dashwood "The Advocate General in the Court of Justice of the European Communities", (1982), 2 Legal Studies, 202; Brown supra, n.61, chapter 4.

64. K. Lasok, The European Court of Justice: Practice and Procedure, (1984), at 3.

65. A consolidated version of the Rules can be found in OJ No. C 39/1 of February 15, 1982.

66. Cases 36 and 71/80. Irish Creamery Milk Suppliers Association v Ireland, [1981], ECR 735. The application for an enquiry was rejected as unnecessary.

67. For the form of a complaint see the Statute of the Court, Article 19.

68. Rules of Procedure (RP) 9(2).

69. RP 41(1).

70. RP 41.

71. RP 44(1).

72. RP 45(2).

73. EEC Statute, Article 29.

74. RP 59.

75. See Brown supra, n.61, chapter 15.

76. The EEC provisions are discussed for convenience. In general, access to the Court is more easily available in the EEC than the ECSC or Euratom due to the specialist nature of the industries involved in the latter.

77. EEC, Article 178.

78. EEC, Article 180.

79. EEC. Article 181.

80. EEC. Article 182.

81. See generally, T. Millet, The Court of First Instance of the European Communities (1990).

82. EEC, Article 168A, added by SEA, Article 11.

83. This provides another example of the differing role of the Commission in the EEC and ECSC. The High Authority under Article 88 of the ECSC has the power to censure states directly. It is the state which must then initiate litigation before the Court.

84. See Rasmussen, supra, n.7, at 236.

85. Case 43/75, Defrenne v Sabena [1976], ECR 455.

86. The Commission won 113 of the first 125 Article 169 cases in which the ECJ gave judgment. See U. Everling, "The Member States of the Community before their Court of Justice" (1984), 9 E.L. Rev. 213.

87. Rasmussen, supra, n.7, at 240.

88. By 1982 only one Article 170 action had reached the court.

89. Article 170(2).

90. See Lasok and Bridge, Introduction to the Law and Institutions of the European Communities (3rd ed. 1982), at 303.

91. A.M. Donner, The Role of the Lawyer in the European Communities (1968), at 62.

92. EEC, Article 173(3).

93. EEC, Article 184.

94. For the variety of Community Legislation see EEC, Article 189.

95. EEC, Article 174.

96. See *infra*, 3.3.6

97. See A. Barav, "Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court." (1974) 11 C.M.L. Rev. 191.

98. See H. Rasmussen, "Why is Article 173 Interpreted Against Private Plaintiffs?" (1980), 5 E.L. Rev. 112.

99. See G. Bebr, Development of Judicial Control of the European Communities (1981), at 163.

100 Case 48/65, Lütticke v Commission [1966] ECR 19.

101. EEC, Article 3.

102. Case 6/64, Costa v ENEL [1964] ECR 585, see *infra*, 4.2.2.

103. *Id.* Quote taken from [1964] CMLR 423, at 455.

104. Advocate General Sir Gordon Slynn, "The Use of Article 177 of the EEC Treaty", The Fifth Lord Fletcher Lecture (1983).

105. *Supra*, n.98 and 99.

106. The Statute of the Court of Justice of the EEC, Article 20.

107. See Everling, *supra*, n.87.

108. See e.g. R. Gwyn, "Europeans Can't Find Common Ground." *Edmonton Journal*, February 8, 1988. A. McEwen, "Thatcher and Kohl Wage their Own Cold War", *The Times*, January 15, 1988.

109. See M. Hewstone, *Understanding Attitudes to the European Community* (1986), at 5.

110. Only 31.8% of registered voters bothered to turn out for the 1984 elections. In 1989 there was a slight improvement with a turnout of 35.9%. G. Clark: *Your Parliament in Europe* (1989), at 12.

111. Owen, *supra*, n.8.

112. *The European Community and the Rule of Law* (1977), at 24.

113. EEC, Article 236.

114. EEC, Articles 5 and 171.

4. THE JURISPRUDENCE OF INTEGRATION

> (The ECJ) has had to define the powers and limits of a new, unique legal order with minimal constitutional guidance. It has had no clear supremacy clause and no Bill of Rights. It has had no support from a strong central government: not from the European Parliament, for this Parliament, even with the blessing of election by universal suffrage, still possesses only advisory and supervisory, not legislative powers; not from the Council of Ministers, for the Council is notoriously the least Community-oriented of all the Community organs; and not from the Commission, since for almost twenty years this organ's powers have been drastically reduced by national or nationalistic, interests and rivalries.[1]

4.1 Methods of Interpretation[2]

It is now no longer a tenable position to argue that a judge merely applies the law in a mechanical fashion to arrive at a result devoid of creative input from the judge. Decision, in any sphere including the judicial, implies choice between alternatives. A judicial decision is the result of a sophisticated ordering of factual and legal material combined with the application of one, or a combination, of a variety of possible interpretative techniques available to the judge. It follows that the judge's choice of interpretative method(s) will have a significant impact on the final result.[3]

A crucial element in the choice by a court of interpretative technique is the style of the legal material before the court. The ECJ deals mainly with treaty articles, which may be comparatively detailed or vague but always lack the precision of legislation adopted to confront a particular problem, and Community legislation. The types of legislative act which may be promulgated by the Community are described in Article 189 (EEC). The possible legally binding acts are: a regulation, which "shall have general application. It shall be binding in its entirety and directly applicable in all Member States"; a directive, which is binding "as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"; and a decision, which is binding in its "entirety upon those to whom it is addressed".

Certain technical legislation and even treaty articles may lend themselves to a strict textual interpretation. Thus in France v High Authority 1954[4] the result hinged on the fact that Article 60 of the ECSC Treaty referred to "the price lists" and not "price lists". The application of a literal interpretation encounters particular problems, however, when authentic texts exist in nine languages. In a case concerning EEC Article 85, Advocate General Lagrange was forced to conclude:

> It is clear that in French the word *affecter* means 'influence', 'have an effect upon'; the effect might be good or bad; the word does not necessarily carry a pejorative meaning.
> However, marked nuances exist in the terms employed in the other languages; in Italian *pregiudicare* is scarcely more pejorative than *affecter*; in German, *beeinträchtigen* seems to connote an unfavourable effect, while in the Dutch text we find *Ongunstigbeinvloeden* which means to exercise an unfavourable influence. Thus the four languages each convey a separate sense, which means that none of them is decisive. In such a case, as always when obscurities or contradictions arise in the letter of the text, we must look to its 'context' or 'spirit'.[5]

Here a literal construction of the Article in any member state will lead to inconsistent application of the Article within the Community. The methods of interpretation most frequently by the ECJ used are the teleological and the purposive (or functional or systematic). Teleological reasoning is simply an acceptance that a piece of legislation or a treaty article does not exist in a vacuum but is an attempt, often an imperfect attempt, to lay down rules applicable to particular situations. If, in a given case, a strict application of the wording of the legislation would produce a result which appears, from the context and objective of the legislation, to be the opposite of that which was desired, then the judge will attempt to give effect to the spirit, rather than the wording, of the legislation. Teleological reasoning is a familiar process in civil law systems. Civil law depends on the application of broadly worded code provisions to concrete factual situations and, as a result, a concentration on the precise wording of the provision may be inappropriate. However, common law lawyers, trained in a system which tends to be more literally oriented, must beware of analysing ECJ decisions based on teleological reasoning in too legalistic a fashion.

A purposive interpretation is located one stage on from teleological reasoning. The techniques shade into each other and a clear distinction is difficult to draw. It is obvious, however, that purposive interpretation has been a major tool of the ECJ in its efforts to define and extend the limits of Community competence. Any piece of Community legislation or treaty article is directly related to the objectives, context and general scheme of the Community as a whole. In particular, constant references are made to the Preambles and the early, general articles of the Treaties.[6] The Preamble to the EEC Treaty states an intention to achieve "an ever closer union among the peoples of Europe." It can be seen that an interpretive technique which relates all decisions back to such an objective always allows the ECJ, if it so desires, to choose the available option which most promotes European integration.

> The principle of the progressive integration of the Member States in order to attain the objectives of the Treaty does not only comprise a political requirement; it amounts rather to a Community legal principle, which the Court of Justice has to bear in mind when interpreting Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets and applies the Treaties. How else should the Court of Justice carry out this function which it has been assigned except by an interpretation of Community law geared to the aims of the Treaty, that is to say, one which is dynamic and teleological.[7]

It has even been argued that the fifth provision of the EEC Preamble is sufficiently precise of itself to have sufficient legal force to provide the Community with a regional policy competence which is not expressly granted to it in the Treaty.[8]

The change in the political climate away from the internationalism and idealism of the 1950s has inevitably led to tension between domestic politicians and a Court whose interpretative methods are founded on a presumption that integration is the ultimate objective of the system of which it forms a part. Advocate General Slynn set out the Court's view of its own function:

> It was to ensure that the system created worked and that the task spelled out in the Treaty was furthered, even if legislative provisions had not been made. This no doubt springs, in part, from the continental conception that the administration has the right to administer. It explains the concept

> of the Commission as guardians of the Treaty whose work, properly understood, must if possible be assisted rather than subjected to over-legalistic scrutiny to see whether it is intra vires. In the process, the Court has over the years propounded its own conception of the Community, its nature and objectives, which permeates the Judgements and explains the method of interpretation .... Those who approve describe this as the creativity or dynamism of the Court; those who disapprove refer to government or Legislation by Judges.[9]

4.1.1 The "Effet Utile"

As a consequence of the use of purposive interpretation, additional ingredients to the process of interpreting treaty and legislative provisions have been utilised. Although generally caution must be exercised in looking to international law for principles of interpretation applicable to the Community,[10] the ECJ has made use of the principle of the effet utile. This states that treaties must be interpreted in such a way as to ensure that the provision to be interpreted is not stripped of any meaning. The correct interpretation is the one which "on the whole" will render the provision "most effective and useful".[11]

The presumption behind this technique is that a treaty represents a rational attempt to express legal obligations in a given field. An interpretation which would deprive a provision of any effect is to ascribe irrationality to the contracting parties and so inevitably defeat their intentions.

The ECJ has applied this technique in the light of the Community structure and organization as a whole, thereby adapting it into a rationale for denying member states the ability to interfere with the effective functioning of the Community:

> It would be contrary to the nature of such a system to allow member states to introduce or retain measures capable of prejudicing the practical effectiveness (effet utile) of the Treaty.[12]

4.1.2 **The "Effet Nécessaire"**

The effet nécessaire was the next interpretative development by the ECJ after the effet utile and stems from the fact that the Community, although created and underpinned by the Treaties, is, because of the nature of those Treaties, dynamic and constantly evolving. As a result it is no longer desirable to continually retreat to the origins of the Community and Community law but to recognise the existence and development of the Community legal order (as defined by the ECJ) as an objective fact and to draw the necessary conclusions which follow from that fact. It is a universalising technique that finally severs all links, however discovered, with the myth of the "intentions of the authors" of the

Treaties to ask what are the consequences which flow from the state of the Community as it exists on the day judgement is pronounced. This enables the ECJ to reverse the normal interpretational sequence. Instead of using Treaty articles to interpret legislative provisions, the later legislation can be used to interpret the scope of the Treaty provision:

> Although it is true that Articles 74 and 75 [EEC] do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force ... of Regulation No. 543/63 ... on the harmonization of certain social legislation relating to road transport necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation.[13]

The express Treaty provisions can no longer be relied upon to define accurately the competence, internal or external, of the Community but must be seen in the light of subsequent developments within the Community. There is no place in Community law for the principle of international law that the subsequent behaviour of the contracting parties may influence the interpretation of a treaty[14], but the subsequent actions of the Community can be used to define the current relationship between it and its constituent member states and to place the Treaties in the context in which they must be interpreted.

4.1.3 The General Principles of Law

The Community has no legal background or tradition, outside of the Treaties, to draw upon when faced with novel questions. It has, however, in the legal cultures of its member states, a huge repository of legal thought, method and principles, all of which are, because of history and cross-influence, fairly homogeneous when contrasted with other legal cultures of the world.[15] Although EEC Article 215 and Euratom Article 188, concerned with non-contractual liability, are the only Treaty provisions which expressly refer to "the general principles common to the laws of the member states", the ECJ has utilised a comparative law method both to interpret the Treaties and Community legislation and to establish some fundamental overriding principles of Community law.

When interpreting provisions which use technical legal terms or rules, then the Court will naturally look only to the law of the member states from whose legal systems the term is drawn or where the rule is applicable.[16] When a party attempts to establish principles of general application a detailed comparative study may be undertaken, which of course is assisted by the variety of legal experience within the Court itself. It is clear that a principle need not be common to all member states' legal systems to form part of Community law,[17] but obviously the more universal the principle the more likely it is to be accepted as part of Community law. In applying general principles of law, the ECJ is again utilising a technique of interpretation which allows it to mitigate or even negate the literal meaning of a provision. General principles can also be used where the provision itself is of little help. In a case involving a regulation, which must be interpreted "in the light of its wording, structure and aims, having regard to the laws of the member states", the Court was asked to establish a rule concerning professional legal privilege, an idea completely outside the scope of the regulation:

> Community law, which derives from not only the economic but also the legal interpenetration of the member states, must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.[18]

The ECJ has established a hierarchy of Community legal norms.[19] Treaty provisions reign supreme (but are generally vague enough that creative interpretation can reconcile any conflict between them and the general principles of Community law), then come the general principles which are attributed a higher status than Community acts and legislation. In the event of a conflict, the Community act will be invalidated. This is, of course, such an extreme step that there is a presumption that if such an act can be interpreted so as to avoid a conflict, and therefore its invalidity, that interpretation will be adopted by the ECJ.[20]

4.2 **Some ECJ Initiatives**

The constitutional development and exposition of the legal order of the Community by the ECJ is a tapestry from which individual threads are difficult to draw. It should be remembered that the following areas are interwoven and that their practical consequences are dependent upon each other. In particular, the supremacy of Community law[21] would have had substantially less impact on the domestic law of member states without the development of the concept of direct effect[22] and its increasingly wide application.

4.2.1 **The Supremacy of Community Law**

The Treaties contain no explicit reference to the relationship between Community law and the domestic law of member states. EEC Article 189 makes regulations "directly applicable" and Article 5 places a general obligation on member states to remove or refrain from introducing any measures or action which might interfere with the achievement of any of the objectives of the Treaty. A major concern was the differing constitutional traditions within domestic legal systems for the domestic consequences of the ratification of treaties.[23] The constitutions of the Netherlands, Luxembourg and Belgium were amended to accommodate membership of the EC. In France Article 55 of the Constitution calls for the supremacy of treaties on the basis of reciprocity only. This means that Community law would not be accepted as supreme in France if one other member state rejected its supremacy. The German Basic Law is unclear but the prevailing theory and case law suggest that customary international law, but not international treaty law, prevails over prior or subsequent federal law but not constitutional provisions. Treaty law has the status only of federal law and as such can be impliedly repealed by subsequent federal law. In Italy, treaty law also has the force of ordinary law only.

At the time of the first enlargement, the new members would have known of the jurisprudence which formed the basis of the supremacy of Community law but, unlike at the time of the accessions of Greece, Spain and Portugal, the full implications of the doctrine would not have been apparent. In

Denmark the prevailing view is that Community law will override ordinary law whether prior or subsequent, but not constitutional provisions. The Irish constitution was amended upon accession to ensure the superiority of Community law. The U.K. legal position on international law is strictly dualist. Treaties have no effect in the domestic legal system unless implemented by national legislation. In accordance with the doctrine of Parliamentary sovereignty, British courts apply the domestic implementing legislation, not the treaty, and that legislation will be impliedly repealed by subsequent inconsistent legislation.

The ECJ, in its interpretation of Community law, has constantly expounded a monist view of the relationship of Community law and domestic law. Although Community law is limited in scope by the Treaty framework, where Community competence exists Community law becomes an integral part of domestic law. Community and domestic law form a single whole, independent of national legislative action. The ECJ must endeavour to convince domestic courts to adopt this approach in their application of Community law if Community law is to be uniformly applied in practice throughout the Community.

4.2.1.1 **Van Gend en Loos 1963**[24]

The ECJ at first restricted itself to have statements of the precedence (rather than the more pejorative supremacy) of Community law. In 1960, in Humblet v Belgium[25] it ruled:

> If the Court rules in a Judgement that a legislative or administrative measure adopted by the authorities of a member state is contrary to Community law, that member state is obliged .... to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have the force of law in the member states following their ratification and which take precedence over national law.[26]

No rationale or justification for the supremacy of Community law is suggested. In Van Gend en Loos 1963 the supremacy of Community law was not the specific issue in the case.[27] Nevertheless in this crucial judgement the ECJ expounded its view of the system of Community law and laid the foundations for its later case law.

In accordance with its obligations under a 1958 modification of the Benelux tariff, the Netherlands increased the duty on aminoplasts. An importer challenged the increase in a Dutch court on the grounds that it violated Article 12 of the EEC Treaty, the "standstill" provisions obliging member states to refrain from increasing or introducing customs duties. The Dutch court made an Article 177 reference to the ECJ. Several member states challenged the admissibility of the action on the grounds that an alleged breach of the Treaty by a member state could only be reviewed by the Article 169 or 170 procedure. Otherwise, "the legal protection of that state would be considerably diminished". In the alternative they argued that the question was one of the relationship between two treaties signed by the Netherlands, which could only be determined according to the Dutch constitution. Therefore, no question of the interpretation (as opposed to application) of the EEC Treaty, upon which the ECJ could pronounce, was involved.

The Commission, in a prophetic submission, argued that an analysis of the legal system set up by the Treaties showed that Community law must be effectively and uniformly applied throughout the entire Community. As a result the internal effect of Community law could not be determined by the domestic law of each member state, as that would lead to differences in application, but only by Community law. It also followed that Community law must prevail over any conflicting national law.

The ECJ rejected the claim that a failure by a member state to fulfil a Community obligation could only be brought before the Court via Article 169-70. This was because:

> The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the member states.[28]

It rejected the plea of inadmissibility based on the distinction between interpretation and application by holding that it was, in fact, only being asked to determine by interpretation the scope of a Treaty article, not to apply it to the situation before the Dutch court, and that such a determination was not related to Dutch constitutional law.

The ECJ also began to describe the legal status of the Community and its relationship to member states legal systems and their citizens:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. INDEPENDENTLY OF THE LEGISLATION OF MEMBER STATES, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[29] (Emphasis added.)

The ECJ achieved three objectives here. Firstly, by refusing to restrict the review of member state action to Articles 169 and 170 it ensured that a mechanism which enabled it to supervise the member states compliance with Community law, in the precise areas in which individuals were being affected by non-compliance, existed. Moreover, this mechanism by-passed the procedural and political difficulties associated with Articles 169 and 170 litigation initiated by the Commission or other member states. Secondly, it emphasized the transfer of sovereignty away from member states implying that in those "limited fields" member states were no longer free to legislate; with respect to member states utilizing the monist approach no conflict could arise as member states could no longer legitimately legislate. Finally, it reserved to itself the power to determine, through interpretation, the exact scope of Community law and thus define the boundaries of the "limited fields" in which member states sovereignty was limited. This gave the ECJ in effect, subject only to the faithful and accurate application of its interpretations and jurisprudence by national courts, the power to rule on the validity of national law as measured against a Community law yardstick.

4.2.1.2 **Costa v ENEL 1964**[30]

With the usual benefit of hindsight, the implications of Van Gend en Loos are clear. This was not the case at the time and in Costa v ENEL 1964 the ECJ was asked to make explicit the implicit effects of Van Gend en Loos.

Italy nationalised her electricity industry in 1962. Flaminio Costa, a lawyer and shareholder in a nationalised company, refused to pay his electricity bill and when sued obtained an Article 177 reference on the grounds that the nationalisation was contrary to Italy's obligations under the EEC Treaty. Any conflict would, under Italian constitutional law, be resolved in favour of the nationalisation legislation as it was an expression of Parliamentary will later in time than the Treaty, which only enjoyed the status of an ordinary law. The Italian Constitutional Court ruled that the principle lex posterior derogat priori applied and that the inferior court judge must simply apply the Italian law without regard to the Treaty. Therefore, there was no purpose served by the Article 177 reference.[31]

Advocate General Lagrange was clearly aware of the potential mine-field which the Court was exploring. He identified the root of the problem as one of the "coexistence of two opposing legal rules ... which both apply to the domestic system" and of the hierarchy of norms to be applied.

He reviewed the constitutional position of treaties in Italy and Germany and referred to the decision of the Italian Constitutional Court:

> It is patently not for me to criticise the Judgement ... But what I would insist upon are the disastrous consequences (and I do not think this expression is too strong) that such a precedent, if it is maintained, would risk having as regards the functioning of the system of institutions established by the Treaty and, as a consequence, the very future of the Common Market.[32]

He pointed out that if Community law cannot be applied within the Italian constitutional structure then it would not be applied in countries which give priority to treaty law only on the basis of reciprocity.

The ECJ was equally concerned and explicitly rejected the possibility of subjecting Community law to national review or amendment by subsequent legislation. It also warned against applying normal national constitutional provisions, concerning the status of treaties, to Community law. The importance of this cornerstone judgement is such that no apology is made for quoting it extensively:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each member state of provisions which derive from the community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.
>
> The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories ...
>
> It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community legal system of the

> rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[33]

A number of observations must be made upon this passage. The ECJ is insisting on a strictly monist view of the relationship between Community law and domestic law. Advocate General Lagrange was more inclined to a dualist approach. "... The system of the Common Market is based upon the creation of a legal system separate from that of the member states, but nevertheless intimately and ever organically tied to it".[34] A monist approach is predicated upon a hierarchy of legal norms which are all components of the same system (note it is the totality of the Community legal system, not just Community law, which now forms an "integral part" of the member states' systems) and, in the event of any conflict, the superior norm prevails. A quasi-federal element must be included where Community law is concerned as Community competence is, at least theoretically, limited by the Treaty framework.

The autonomy and independence of the Community is stressed. This unfetters Community law not only from constraints and review imposed by national law due to the permanent transfer of national sovereignty to the Community, but also from any potential limitations imposed by international law. The ECJ denies the relevance of ordinary international legal principles because of the sui generis nature of the Community. This means that domestic rules and principles concerning the relationship between national and international law are not applicable and should not be referred to by national courts. It also pre-empts, by denying by analogy, criticism of the ECJ based upon international law such as the Vienna Convention on the Law of Treaties[35] or the case law of the International Court of Justice. In effect it makes Community law and itself, as the ultimate arbiter of Community law, inviolate. The ECJ's refusal to consider itself bound by international law in general does not, of course, prevent it from drawing on international law when it feels that resorting to it would be helpful.[36]

Finally, the ultimate factor is the necessary logic which springs from the existence of the Community and the effet utile. It is impossible to disagree with the Court that if the Community is to function at all and not degenerate into retaliatory protectionism then the practical application and effects of Community law must, at least in principle even if minor distortions can be tolerated in practice, be consistent throughout the Community. It cannot be vulnerable to attack by subsequent legislation or to the foibles of an individual constitutional structure or government.

4.2.1.3 **Further Developments**

Once it had been established that Community law takes precedence over national law and that member states had deprived themselves of the sovereignty necessary to take action in areas of Community competence, the precise limits of Community competence at any given time became important. In Walt Wilheim 1969[37] the question arose whether national anti-cartel legislation could be applied in circumstances in which the Commission had already initiated Community anti-cartel procedures. Advocate General Roemer discussed the possibility of a "double barrier" and concluded that national legislation which imposed stricter standards on cartels than Community law could not be said to hinder the object of competition and that, as the Community had not, at this time, established an exclusive competence on competition law, the national legislation could be applied concurrently with Community measures.

The ECJ accepted this and after stressing again the priority of Community law, concluded:

> So long as a regulation adopted pursuant to Art. 87(2)(e) (which allows the Council to determine the relationship between national and Community competition rules) has not provided otherwise, national authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law of the effects of measures taken or to be taken to implement it.[38]

It follows that a concurrent jurisdiction can exist until such time as the Community takes action establishing exclusive jurisdiction or defining the relationship between the two jurisdictions. However, even when such detailed provisions have not been introduced, the national legislation must not conflict with the general provisions and objectives of Community law as that would threaten the uniformity of its application.

In Costa v ENEL 1964[39] the ECJ was faced with a conflict between Community law and a subsequent national law. In Internationale Handelsgesellschaft 1970[40] the Court was faced with a potential conflict between Community law and a fundamental right protected by the German constitution. After the Second World War and her experience of a regime which displayed little respect for human rights, the German politico /legal establishment was ill-disposed to allow a de facto constitutional amendment by Community law via the back door. Although well aware of the potential political storm which might be created, the ECJ stuck, uncompromisingly, to its guns:

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law ... Therefore the validity of a Community measure or its effects within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.[41]

It seems that nothing will be allowed to stand in the path of the logic of Community autonomy and supremacy.

4.2.1.4 **Simmenthal (No 2) 1977**[42]

After an earlier ruling, an Italian Court was faced with subsequent legislation which conflicted with a Council regulation (regulations are expressed by Article 189 to be "directly applicable"). Under the Italian constitution, a judge must apply Italian law until it is declared unconstitutional by the Constitutional Court, which is the only court competent to declare legislation invalid. The Italian Judge made a second reference to the ECJ asking if he should disregard the legislation in the interim. The Italian government argued that it was only by a ruling from the Constitutional Court that a piece of legislation could be ruled invalid and its invalidity acknowledged and applied throughout the country. To allow individual national judges to pronounce on the compatibility of national and EC law would involve numerous references to the ECJ on the same legislation and run the risk of non-uniform application of both Community and national law. The ECJ, again concentrating on giving effect to Community law in all circumstances, arrived at three major conclusions:

> (Directly applicable Community law provisions) not only by their entry into force render automatically inapplicable any conflicting provision of current national law but ... also PRECLUDE the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions ...[43]
>
> Any provision of a national legal system and any administrative of Judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative decisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law ...
>
> A court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary REFUSING OF ITS OWN MOTION to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the Court to request or await the prior setting aside of such provision by

> legislative or other constitutional means. (Emphasis added)[44]

The ECJ defines an exclusive Community competence as being established by the entry into force of any directly applicable Community law and explains that the consequences of an exclusive Community competence are such that national legislatures no longer have the power validly to legislate contrary to that Community law. This is transferral of sovereignty with a vengeance and allows national judges to pass judgement, not theoretically, on the national legislation itself, but on the capacity of the national legislature to enact it.

This, coupled with the ruling that national practices preventing the national Judge from exercising this power of review are themselves contrary to Community law and empowering local judges, on their own initiative, to ignore national legislation surely, if British judges ever accept the full implications of the judgement, sounds the death knell for the doctrine of Parliamentary supremacy:

> The idea that a court is entitled to disregard a provision in an act of Parliament on any ground must seem strange and starting to anyone with knowledge of the history and law of our country.[45]

If the ECJ can persuade the House of Lords to change its attitude to such questions it will have succeeded in changing the grundnorm of the British legal system and that will be a most impressive demonstration of the power of political integration through jurisprudence.

4.2.2 **The Doctrine of Direct Effect**

If Community law is held to be supreme over national law the question changes. Which Community law is supreme? Community law is enacted in a number of different forms. There are the Treaties themselves and the variety of legislation described in Article 189, EEC.[46] Article 189 makes regulations "directly applicable", therefore they prevail over national law by virtue of the Treaty itself. Other Treaty articles, directives and decisions appear to place obligations primarily upon member states and particular addressees; recommendations and opinions, also mentioned in Article 189, appear to have no binding legal force whatsoever.

The ECJ has ignored distinctions based on form, rather than substance, when developing its concept of direct effect. A directly effective provision is one which creates individual rights in Community law which national courts must enforce. A substantial portion of Article 177 references are from domestic courts asking if a provision of Community law is directly effective and so may be relied upon in domestic litigation irrespective of the relevant national legislation.

In general, it is true to say that, whenever possible, the ECJ has found Community law to be directly effective. By insisting on the widest possible scope for directly effective Community law the ECJ has ensured that it takes a place in the centre, rather than the periphery, of the work of national courts. This means that Community law becomes part of the legal landscape which lawyers view in their day-to-day work. The intrusion into domestic law of a large body of law, rather than comparatively few regulations, will lead to a greater familiarity with Community law in national legal circles, providing a further boost to the legal integration of the Community.

> Provisions producing direct effect are a powerful and manifold instrument for pursuing the ultimate objectives of the Community legal order. They promote and develop Community rights of individuals, reinforce an effective operation of the Community legal order and so enhance an effective pursuance of the Community objectives and further a legal integration.[47]

4.2.2.1 Van Gend Again[48]

It will be recalled that this case involved an increase in a customs duty in accordance with the Benelux tariff but allegedly in breach of the "standstill" provision of the EEC Treaty, Article 12. An importer challenged the increase and the Dutch court referred to the ECJ the question:

> Whether Article 12 of the EEC Treaty has direct application within the territory of a member state, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect;

The three governments who made submissions in the case - the Netherlands, Belgium and West Germany - assumed that the Treaty was an ordinary international agreement and should be interpreted as such. The internal effect of a treaty could only be established by reference to the intention of the contracting parties and the wording of the provision in question.

International agreements would only create direct rights for individuals if that was its "very object ... according to the intention of the parties."[49] Here were half of the signatories to the Treaty claiming, unopposed by any other member state, that there had been no such intention when the Treaty was signed only five years ago. Advocate General Roemer supported the governments and advised that Article 12 did not have direct effect. He conducted a wide-ranging survey of the Treaty and concluded:

> Apart from designating those to whom it is addressed, Article 12 recalls the wording of other provisions which appear to me beyond any doubt only to lay down obligations for Member States, for they speak expressly of "obligations" even if only in later paragraphs.[50]

He supported his position by stating that the complex content of the article and the powers still retained by the member states in customs areas argued against direct effect. Finally, he pointed out the differing constitutional positions of international law within the member states and the distortions direct effect would create as a result.

As has been described[51] the ECJ dealt with this last problem by stressing the autonomy of Community law and laying the foundations for its supremacy over national law. By denying the relevance of ordinary international law, the ECJ side-stepped the arguments of the three governments. In exact contradiction to Advocate General Roemer, the ECJ held that Article 12 had direct effects in the legal systems of member states BECAUSE of the content of the provision:

> The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to pro-

> duce direct effects in the legal relationship between Member States and their subjects.
>
> The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.[52]

A large number of articles in the Treaties impose obligations on member states. Once the ECJ had held that such articles were capable of creating individual rights, the potential of the direct integration of Community law into national legal systems was greatly enhanced. Furthermore, the ECJ's concentration on the substance, rather than the form, of a provision was to provide the tool with which the ECJ was later to open up a channel to national legal systems through the dam of Article 189, turning what could have been a trickle of regulations into a flood of secondary legislation enforced by national courts.

In Lütticke 1966[53] the ECJ removed what had appeared in Van Gend to be a substantial restriction on the articles of the Treaty which were capable of having a direct impact within national legal systems. Article 12 was described in Van Gend as ideally suited for internal application by national courts because it imposed a negative rather than a positive obligation. Therefore, positive governmental action contravening the article was easy to identify. Article 95(3), the article found to be directly effective in Lütticke, imposed a positive obligation on member states to eliminate internal taxation laws which operated, directly or indirectly, in a discriminatory fashion with respect to the products of other member states. The German, Dutch and Belgian governments opposed this extension of direct effect, particularly as it related to their jealously guarded "tax sovereignty".

4.2.2.2 Decisions, Directives and Direct Effect

Much academic ink has been spilt over the distinction, if any, between direct applicability and direct effect.[54] The restriction of direct applicability, in Article 189, to regulations was interpreted by national governments as implying that other Community legislation, despite the binding force of directives and decisions, could not be relied upon by individuals before national courts. The Community, under several provisions of the Treaties [55], is not empowered to issue regulations but must act via directives and/or decisions. This could lead, because of the variety of possible implementing measures and time-tables of the member states, to discrimination through the non-uniform application of Community law.

4.2.2.3 **GRAD 1970**[56]

Council Decision No. 65/271 provided that when a Common System of turnover tax on the carriage of goods was implemented by the Community and the member states, it would replace national taxation in that area. A date by which the turnover tax was to be established was set by Council Directive No. 69/463. Germany fulfilled its obligations under the decision early but also instituted a new tax on the carriage of goods by road. This was challenged by various carriers on the basis that it could not be enforced against them as it contravened the Council decision and, therefore, Community law. For current purposes, only the questions of admissibility and direct effect are important. Given the fact that Article 189 refers to decisions as binding "upon those to whom they are addressed," was it possible for the Court to hear an Article 177 reference from litigation initiated by a non-addressee about an alleged failure of a member state to comply with a decision? If the reference could be heard, was a decision capable of creating individual rights which national courts must protect, i.e. of being directly effective? It will be seen immediately that the questions are inextricably linked. If a decision, by its nature, could never produce direct effects then the application would be inadmissible, as raising no question of the interpretation of

Community law. If, however, decisions might in some circumstances produce direct effects in domestic legal systems then the ECJ would have to go on to examine whether, or not this particular decision did have such an effect.

Not surprisingly the German Government argued that decisions could not have direct effects, based on Article 189 and the scheme of legislation established by the Treaty. The Commission restricted itself to commenting that such an argument, based on the fact that the decision was addressed to member states, was not decisive. Advocate General Roemer found that decisions could have direct effects by considering, primarily, the policy issues supported by the case law on the direct effect of provisions of the Treaty:

> The direct implementation of this kind of Community law, is eminently suited to promote integration and to strengthen the legal protection of the citizens of the Market in the national courts.[57]

To leave open only Article 169 as a channel of enforcement would, in reality, leave private citizens with little means of redress against a state's failure to fulfil its obligations.

These policy issues, though unacknowledged, undoubtedly weighed heavily with the Court. It rejected the arguments based on Article 189 and in doing so emphasized that direct effect was a question of substance, not form, and that legalistic a contrario approaches must give way to the necessity of achieving effective enforceability for Community law:

> Although it is true that by virtue of Article 189, regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that article can never produce similar effects ... It would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities by means of a decision have imposed an obligation on a Member State or all of the Member States to act in a certain way, the effectiveness (L'effet utile) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law. Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measures before the courts, may be the same as that of a directly applicable provision of a regulation ... in each particular case, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties.[58]

The finding that the direct impact of Community law into domestic legal systems is not restricted to regulations expanded the areas within the relationship between member states and the Community which are subject to judicial, rather than primarily political and inter-state diplomatic, supervision. The major responsibility for ensuring state compliance with Community law shifted, as a result, from the Commission and member states through Articles 169 and 170, to individuals and national courts through Article 177.

4.2.2.4 SACE 1970

In SACE 1970[59] the Grad reasoning was extended to Article 13(2), despite the fact that the deadline for member state compliance with this Treaty obligation was laid down in a directive. The German government repeated its opposition to the principle of Community legislation (other than regulations) having a direct impact on national legal systems, but also referred to the rationale of Van Gend. The primary consideration in Van Gend, giving direct effect to a Treaty provision, had been the need to ensure the uniformity of Community law both in substance and territory. The directive at issue in SACE was addressed only to Italy and aimed at a specific tax. Therefore, it was argued, the Van Gend precedent was inapplicable and there was no basis upon which to hold the directive directly effective.

The ECJ did not refute this argument directly but held that the directive must be viewed in the context of its combined effect along with the Treaty articles it was designed to implement:

> It is necessary to consider not only the form of the measure at issue, but also its substance and its function in the system of the Treaty[60].

A directive which sets a deadline for the performance of a Community obligation is capable of creating rights for individuals because the obligation itself is a Treaty obligation, the nature of which is unaffected by the mechanism chosen to implement it.

This judgement creates an alternative basis for the direct effect of Treaty articles. Van Gend relied on the nature of the Community system as a whole and the need for uniformity. Here, the concentration is on the nature of specific obligations accepted by member states as a result of their membership. A Treaty obligation which is itself directly effective will not be prevented from being so by the fact that the obligation was implemented, through Community legislation, earlier than would have been under the final transition deadline specified in the Treaty. Article 13(2) gives the Commission the power to lay down, by means of directives, a timetable and to deny direct effect to directives issued in exercise of that power would be to render the Commission impotent if faced by an intransigent member state.

4.2.2.5 **The First English Case**

The next step forward was the case of Van Duyn 1974.[61] This was the first reference to the ECJ from an English court and the decision displayed the ECJ's usual enthusiasm for expanding the scope of Community law; but, at the same time, a prudent respect for political and public relations factors was demonstrated.

Miss Van Duyn, a Dutch national, was refused entry into Britain to take up a job with the Church of Scientology. Scientology is a quasi-religious organisation which has an unsavoury reputation in that it has been the subject of allegations of brainwashing, deliberate alienation of its members from their families and authoritarian practices which have a detrimental effect on the health of its followers. The organisation is not proscribed in the U.K., but administrative measures to discourage its growth are applied, one of which led to Miss Van Duyn being refused entry into the U.K.

Article 48, which had already been held to be directly effective by the ECJ[62], concerns the free movement of workers within the EC and prohibits any discrimination based on nationality. Miss Van Duyn argued that, as a British national would not be prohibited from working for the Scientology organisation, to refuse her entry to take up such a job amounted to discrimination on the grounds of nationality. Article 48 allows member states to limit the freedom of movement of workers if such limitations can be justified on the grounds of public policy, public security or public health. An English court would have found very little difficulty in upholding the immigration officer's decision on the grounds of public policy.

However, Council Directive 64/221 defines the criteria by which a claim to have the right to exclude an EC national on the grounds of public policy must be evaluated. Article 3(1) of the Directive provides that "measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned".

U.K. Immigration had refused access to Miss Van Duyn following a policy decision by the British government that work permits would not be issued to foreign nationals intending to work with the Church of Scientology. The explanation given to Miss Van Duyn was that:

> ... the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of that [the Scientology] organisation.[63]

If Directive 64/221 was directly effective then such a blanket policy might be a breach of EC law in failing to base each decision to exclude on the personal conduct of the individual seeking entry.

This directive was qualitatively different from the others which had previously been held to be directly effective. In previous cases, the law which was held to be an integral part of the law of each member state stemmed from the Treaty. The directives were merely implementing measures, affecting the date of commencement but not creating new obligations. Here the directive, by defining the area of discretion still available to member states under the Treaty article, was, of itself, creating law. If the directive was not held to be directly effective then member states would have a discretion when and how to provide criteria to their national judiciaries for evaluating decisions allegedly based on public policy. If it was held to be directly effective then it would be established that Community rights which must be

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protected by national courts could be created by directives independently of the Treaty.

The ECJ held that Article 3(1) of the Directive was directly effective:

> First the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part of either of the institutions of the Community or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.[54]

The Court relied on the absolute and self sufficient nature of the provision combined with the desirability of maximum legal certainty for individuals seeking to rely on generally expressed Community principles. These factors outweigh legalistic arguments based on the form of provision.

However, perhaps with an eye on the potential political and public relations pitfalls of prohibiting measures aimed at discouraging cult and other unpopular organisations (and the judgement was delivered at a time when the British referendum on continued membership of the Community was imminent) the Court also decided that a current association with a particular organisation is in itself "personal conduct" allowing it to legitimately be considered a justification for the exclusion of Miss Van Duyn. If a member state has decided that the activities of a particular organisation are socially harmful and has made it clear that this is the official attitude towards it, the member state need not make the activities of that organisation illegal before it can plead an exception based on public policy.

4.2.2.6 Gabrielle - Avenging Air Hostess

The next case provides an illustration of the impact an individual, with the necessary backing, can have on public and private behaviour through test case litigation. Gabrielle Defrenne, an air hostess with the Belgian state airline, Sabena, challenged, via an Article 177 reference, a Royal Decree governing the pension rights of air crew.[65] Undaunted by her failure on that occasion she continued parallel litigation begun in 1968 concerning a discrepancy in the salary paid to male and female air crew performing the same duties.[66] In 1975 an Article 177 reference was made to the ECJ concerning the interpretation and effect of Article 119 of the EEC Treaty which provides that:

> Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for work of equal value.

The first stage ended at midnight on December 31, 1961. However, a conference of member states adopted a resolution on December 30, 1961 delaying the implementation of Article 119 until December 31, 1964.

In 1973 the Commission announced its intention to instigate Article 169 proceedings against member states which had not fulfilled their obligations in respect of equal pay by implementing Article 119, but failed to do so.

The questions referred to the ECJ concerned whether Article 119 was directly applicable, if so from what date, and the general competence of the EC, as contrasted with national legislatures, in this area. The ECJ made three important decisions. It held:

a) That discrimination contrary to Article 119 was of two types:

> ... direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be

identified by reference to more explicit implementing provisions of a Community or national character.[68]

Whilst disguised discrimination could not be pronounced upon by national courts without further legislative guidance, from whatever source, a blatant pay differential for identical work could be. To that extent, therefore, the article could be relied upon before national courts.

b) That the Treaty could only be modified by the specific procedure laid down in Article 236 and that, therefore, Article 119 was directly applicable from the end of the first stage i.e. January 1, 1962. In the new member states the article came into force with the Treaty of Accession.

c) That in view of the exceptional circumstances surrounding the case, the decision would not be retroactive. The article would only be directly applicable as regards claims for periods after, and claims commenced before, the date of the judgement.

Although the implications of the judgement itself are far reaching, it was the temporal effect which attracted the most immediate reactions. The ECJ was not merely explaining what the law had always been, the generally accepted function of a court, but explicitly changing the law from a specific date, the normal approach of a legislative body. The ECJ was heavily influenced by submissions, made, almost in passing, by Ireland and the U.K. about the effects a judgement in favour of Ms Defrenne would have.

Ireland pointed out that it would cost the Irish state a sum greater than her entire allocation from the EEC's Regional Fund for 1975-77, to recompense female employees for the illegal discrimination suffered by them since Ireland's accession.

As a result the ECJ indulged in some judicial newspeak:

> Although the practical consequences of any judicial decision must be carefully taken into account it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the grounds of the possible repercussions which might result, as regards the past, from such a judicial decision.
>
> However... it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law.

> ...important considerations of legal certainty affecting all the interests involved, both public and private, making it impossible in principle to reopen the question as regards the past.[69]

Professor Hamson, after reviewing the preceding cases and acknowledging that Defrenne was a logical application of the ECJ's existing jurisprudence, commented that:

> ...in order to avoid mere chaos the Court is compelled to claim and to exercise a dispensing power which is I believe not known to any modern court of any of the Member States... the power to suspend as to the past... and the power to declare law de novo as to the future (ie. to make it effective as from a given date) is inherently the mark of the legislative function and there is an obstinate belief on the continent of Europe that a court does not have a legislative function.[70]

A functional approach is implicit in the Court's decision. If the EC was to operate effectively then the demands of the Treaty could not be ignored with impunity nor tinkered with by informal agreements. This was the prime consideration. However, the member states had thought that they had successfully avoided breaking their Treaty obligations, the Commission had connived and the financial consequences were enormous. Faced with weighing two strong but conflicting arguments, principle against legal and financial certainty, the Court again reconciled the irreconcilable through a pragmatic solution. The Court upheld the authority of the Treaty but, because Member States were not to "blame", relieved them of the consequences of the decision.

It is far from clear that the distinction drawn between direct and indirect discrimination can be applied with any degree of certainty of outcome. It appears that the ECJ looked at the facts and asked itself, does this contravene Article 119? The facts provided such a blatant breach of any self-respecting egalitarian principle that the Court may have felt that to allow it to escape censure would undermine any future application of the article. The issue becomes one of justiciability in reverse. The question is not whether this rule provides a court with the guidance needed to pronounce a result but, given these facts, whether the rule can be applied.

The ECJ was not yet sufficiently confident of its authority to justify egalitarian principles purely on social grounds, as human rights, but confirmed that the Community was an economic community which must justify its actions in economic terms. Advocate General Trabucchi explained that Article 119 was not only a social provision giving effect to an International Labour Organisation Convention, but also served to ensure fair competition by prohibiting the use of a female workforce paid substantially less than its male equivalent without regard to the actual work being carried out. Companies must pay for the job, not for the sex of their employees.[71]

The ECJ adopted this line of argument as their primary consideration:

> First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in infra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.[72]

The social objectives of the Community were referred to, to stress the irresistible forces of integration, backed by the functionalism of the ECJ, pushing the Community,

> ... which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement in the living and working conditions of their peoples, as is emphasised by the Preamble to the Treaty.[73]

4.2.2.7 **A Retreat?**

The ECJ had now firmly established that, in appropriate circumstances, Treaty articles, regulations, decisions and directives could all be relied upon by individuals in their national courts irrespective of any conflicting domestic legislation.

However, what had not been established was the effect that European law and, in particular, directives had on agreements between private individuals. In Defrenne, Advocate General Trabucchi had no doubt that the status of the parties to litigation in a domestic court was irrelevant to any issue of European law. Sabena was the state airline but, as the Advocate General pointed out, Article 119 is directed at the employer-employee relationship, which is normally a relationship between private entities. He acknowledged that to draw a distinction between the public and private sector would merely create new discrimination based on different criteria:

> It follows that the obligation to observe the principle of equality is imposed not only on the State, in as much as the determination of the pay of government servants is concerned but, ... it also has effects in the field left to trade union organisations and individuals in which to conclude their collective or individual contracts. This is due entirely to the provision of the Treaty regardless of other implementing provisions adopted to this end by the state.[74]

If employers discriminated in the wages paid to female employees the solution was simple: national law and any other act conflicting with Community law is inapplicable, national courts should declare any clause in any pay agreement providing for lower wages to be paid to female employees invalid and substitute the higher rate of pay.

The ECJ agreed:

> In fact since Article 119 is mandatory in nature the prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.[75]

However, as this case concerned a Treaty article it was felt that the impact on third parties of Community secondary legislation had not been established. Directives tend to become directly effective because of the failure of member states to implement them correctly or at all. If a third party complied with domestic law there appeared to be an element of injustice in imposing liability on that third party for the default of their government. The question of "horizontal direct effect" had not been answered sufficiently clearly.

Horizontal direct effect depended on the rationale behind direct effect itself. If it was based on the need for uniformity of European law then clearly it must act horizontally. The rights of individuals under European law could not depend on the purely fortuitous identity of their employer, nor could the position of identical industries under European law depend on whether they were in state or private hands (not to mention the difficulty of defining state control - is a floated company with 51% of its shares held by the state a public or a private entity?). Such an approach would substantially increase the regional variations in the application of Community law. However, if the justification for direct effect is a type of estoppel - that a government should not be allowed to plead its own failure to implement directives as a defence to court actions against it - then third parties would be unaffected by directives until their implementation via domestic legislation.

The ECJ avoided providing an answer in several cases[76] and then, ironically, resolved the debate in Marshall v Southampton Area Health Authority 1984[77] when it could have easily disposed of the case on other grounds.

Ms. Marshall's employers had a policy of compulsory retirement for their employees. The age at which employees were retired was set, logically enough, at the age the employee became eligible for a state pension - 65 for men and 60 for women.

Although, as a concession, Ms Marshall was allowed to work until she was 62, she was then retired against her will. She brought an action before an Industrial Tribunal which she lost on the domestic law (The Sex Discrimination Act 1975) but won on the grounds that the Health Authority's policy was discriminatory and contrary to EC law (Directive 76/207). Her employers successfully appealed to the Employment Appeal Tribunal, which held that the directive could not be relied upon before domestic courts. The Court of Appeal made an Article 177 reference to the ECJ asking if the retirement age policy of the Health Authority was contrary to the directive and, if so, could the directive be relied upon in domestic courts?

Directive 76/207 was intended to implement the principle of equal treatment. Member states, by 12 August 1978, should have ensured, in particular under Article 5.2(d) of the directive, that:

> ... any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be or may be declared null and void or may be amended.

This Directive applies to "working conditions, including the conditions governing dismissal". The Health Authority and the U.K. argued that the situation was not governed by rules relating to dismissal, but by Directive 79/7, relating to social security; which expressly reserves to member states the absolute right to fix pensionable age and excludes from the scope of that Directive "the possible consequences thereof for other benefits".

By relying on Directive 79/7 the case of Burton v British Railways Board 1981[78] could be prayed in aid of the employer and the U.K. In that case a voluntary redundancy scheme was offered to people within 5 years of the normal minimum pensionable age. The result of the differing ages for state pensions was that women could take voluntary redundancy at 55 but men had to wait until they were 60. The ECJ held that this was a consequence for benefits of the determination by the U.K. government of a minimum pensionable age; it was, therefore, covered by the exception in Directive 79/7 and was not contrary to EC law.

In Marshall the ECJ held that the issue was one of a policy of compulsory retirement which amounted to dismissal. The fact that the age at which it operated was set at the state-determined pensionable age did not alter the nature of the policy. The policy was, therefore, contrary to the directive and a breach of EC law.

The case raised the usual two questions: was the dismissal, which was lawful under domestic law, contrary to EC law? and, if so, could the directive be relied upon by an individual before a national court?

The ECJ held that the "dismissal" was contrary to EC law by stressing a general policy of construing provisions relating to equality of treatment expansively (ie. "dismissal" in Directive 76/207) and exceptions to that principle (i.e. the "social security" exception in Directive 79/7) narrowly. It justified this approach by characterising the principle of equality of treatment as of "fundamental importance", implying that it was further up the hierarchy of community norms than the social security exception.

This decision demonstrates again the ECJ's willingness to abstract wide-ranging and potentially far-reaching constitutional implications from individual cases. On a simple analysis of the facts it would have been open to the court to merely characterise the case as one involving dismissal rather than social security and pension rights. However, it chose to base its decision on an approach which predicated a hierarchy of norms rather than a choice of relevancy between two conflicting but equal norms. This was a further development of the ECJ's fundamental rights jurisprudence.[79]

The ECJ, in answer to the second question, finally pronounced without any necessity to do so, on the "horizonal direct effect" of directives. Once it had been settled that directives could, in certain circumstances, be relied on in national courts then the question became, against whom? Only against the member state which had failed to implement the directives adequately, or at all, or against any individual? This raised the question of the rationale behind the direct effect of directives. Was it a quasi-estoppel - that the state should not be allowed to plead its own default in its defence, or did it involve wider questions concerning the enforcement and uniformity of Community law? Either approach would inevitably lead to anomalies and injustice. If there was held to be horizontal direct effect (i.e. individuals could rely on the directive in national courts against other individuals, e.g. an employee against a private employer) then it would be extremely difficult to establish the exact legal position of the parties when they entered into private legal relations. Local lawyers are unlikely to be fully conversant with all of the relevant European law and would, in any event, find it difficult to advise on particular provisions of directives unless they had previously been declared directly effective or otherwise by the ECJ.

However, if only the state rather than individuals must abide by directly effective directives then anomalies will abound depending on the function and definition of the state within each member state. Britain, for example, is currently in the midst of an ideologically inspired privatisation programme. The rights of an employee in a newly privatised industry would undergo a significant and unilateral alteration on the day of privatisation as the employer ceases to be an "emanation of the state". Similarly if the electricity industry in Italy is a nationalised industry and the Danish electricity industry is in private hands, it detracts from the uniform application of Community law if the Italian, but not the Danish workers can rely on upon Community law, before their national courts.

The ECJ was not forced to settle the matter. It could have held that the provisions in question were directly effective and, since the Court of Appeal had, in its reference to the ECJ, stated that the Area Health Authority was "an emanation of the state", that would have disposed of the case. It was not necessary for the ECJ effectively to consider the hypothetical case of a private employer being in breach of the directive.

However, it chose to do so and, surprisingly (and arguably contrary to parts of its Defrenne judgement), held that there was no horizontal direct effect for directives. Directives could not provide individuals with rights which could be relied on in national courts against other individuals:

> ... it must be emphasised that according to Article 189 of the EEC Treaty the binding nature of a directive which constitutes a basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed". It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as against such a person.[80]

The ECJ went on to say that no arbitrary distinctions would be created by this decision if member states complied with their obligations and implemented directives into national law. This accurate, if somewhat disingenuous, solution to the problem is a far cry from the Court's previous uncompromising promotion of the need for uniformity of the application as well as the theory of Community law and its previous refusal to give precedence to form over substance.

It also represents an implicit rejection of the previously espoused monist theory of the relationship between the Community and national legal systems. If workers in the same member state have different rights, one under Community and another under national law, depending on the status of their employer, then it cannot be denied that two disparate systems of law, rather than one integrated system, exist.

This decision was the first in which the ECJ, when faced with the possibility of expanding, in accordance with previously espoused case law, the effectiveness of Community law and ensuring its uniform application throughout the Community, declined to do so.

4.2.3 Fundamental Rights

There is no catalogue of fundamental rights in the Community treaties. Certain freedoms are explicitly recognised e.g. equal pay for equal work and freedom from discrimination on grounds of nationality, but there is no recognition of the existence of other rights against the organs of the Community or member states. However, such rights are present in the domestic law of most member states, either in written constitutions or the case law developed by the domestic courts.

There is an obvious potential conflict here and, at first, the ECJ was reluctant to examine the legality of Community acts against a yardstick of any nationally protected fundamental rights.[81] The members of the EC have (at least according to the ECJ and effectively in practice) transferred previously national functions to a supra-national legislative power which is not bound by the same considerations of, and limitations imposed by, fundamental rights protected in the domestic law of the member states. The courts of such countries are reluctant to subject domestic constitutional standards with regard to fundamental rights to the possibility of being ignored by Community law. It is no coincidence that this conflict has been explicitly raised by the courts of Italy and Germany, countries which, in their recent history, have been subjected to regimes with little respect for fundamental rights. After the ECJ proclaimed the absolute supremacy of Community law in all circumstances in Costa[82], the German and Italian constitutional courts warned that the preeminence of Community law had its constitutional limitations with regard to fundamental rights.

4.2.3.1 **The ECJ's Response**

The possibility that Community law might be subject to a domestic limitation and therefore applied differently in different countries would set a dangerous precedent and hamper harmonisation and integration. The ECJ has therefore developed a jurisprudence which will succeed in avoiding such a conflict if at all possible. In Straunder 1969[83] the Court concluded that:

> The decision in question does not contain any element that might jeopardise the fundamental rights of the individual contained in the general principles of the law of the Community of which the Court must ensure the observance.[84]

This was the first explicit recognition that Community acts are subject to the "general principles" of Community law which comprise fundamental rights for individuals.

The next case was the important one of Internationale Handelsgesellschaft 1970[85]. After reasserting that Community law could not be subject to the guarantees of fundamental rights laid down in the German constitution the Court went on:

> ... respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework and the structure and objectives of the Community.[86]

Therefore, when checking Community acts against general fundamental rights, the Court would consider the protection provided in the domestic law of the member states. However, Community law itself could not be overridden by national law, be it constitutional or otherwise.

The German constitutional court agreed with the ECJ on the facts of the case, but affirmed that it would subject Community acts to its own constitution until such time as Community protection for fundamental rights was effectively coextensive with the protection in the German constitution. The German court implied that the Community concept of fundamental rights was vague and inadequate and preferred a "codified catalogue" such as existed in the German constitution:

> The Community still lacks a democratically legitimised Parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level... It still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future.[87]

The German Court specifically addressed the constitutional issues (as one would expect a constitutional court to do) and laid down the criteria which would have to be satisfied before Germany could accept the ECJ's view of the supremacy of EC law over the German constitution: a directly-elected legislative Parliament and a bill of rights.

This was, however, a potential rather than an actual rebellion. In answer to the Commission the German government expressed its conviction that none of the potential conflicts indicated would ever arise, and the German Court subsequently revised its position in view of the political developments in the EC and the ECJ's developing fundamental rights jurisprudence.

In Nold 1974[88] the ECJ expanded on the foundations created by these two cases. It accepted that fundamental rights form an integral part of the general principles of law which the ECJ would apply. This recognition is distinct from that contained in Strauder in that the reference is to "general principles of law" rather than general principles of Community law. This is a much wider concept and gives the ECJ a much greater discretion as to where to draw influences from. The Court recognised the influence of members' constitutional traditions and held that the ECJ:

> ... cannot, therefore, uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those states.[89]

The Court did not specify that the fundamental rights must be common to all member states. This suggests that the court will apply a maximum standard of protection of fundamental rights, rather than the lowest common denominator, and will invalidate any rule of Community law which is in conflict with any of the rights guaranteed by any of the constitutions of the member states.

Nold was also the first case to refer to international treaties on human rights which the ECJ suggested could supply "guidelines" which should be followed within the framework of Community law. Rutili 1975[90] specifically invoked provisions of the European Convention on Human Rights[91] and extended their application not just to the acts of the Community, but also to the actions of member states. There seems to exist a consensus, that admittedly has never been expressly stated, that the Community is legally bound by the ECHR in so far as its provisions form part of the general principles of Community law. In Prais v Council 1976[92] the Court noted that the Council did not seek to deny that the right to freedom of religion contained within the ECHR formed part of the fundamental rights recognised by Community law.

If the ECHR is binding on the Community and, therefore, forms part of Community law then could it be part of the

Community law which is directly effective and must be enforced by domestic courts? The principle of supremacy of Community law and the direct effectiveness of that law when it comes to general principles seems to be clear. In Watson and Belmann 1976 Advocate General Trabucchi was in no doubt. He said that the ECJ:

> can look into an infringement of a fundamental right by a state body... at least to the extent to which the fundamental right alleged to have been infringed may invoke the protection of an economic right which is among the specific objects of the treaty.[93]

As yet, however, the ECJ has only applied the ECHR to the acts of the Community institutions. In Britain, where the Convention has not been implemented into domestic law, the courts have rejected any suggestion that the ECHR should be applied in the U.K. on the grounds that it form part of the Community law.[94]

4.2.3.2 The Highest Possible Standard

The ECJ will, therefore, protect fundamental rights derived from a number of sources: the general principles of law, international treaties on human rights (particularly the ECHR) and the fundamental rights protected by the constitution of any member state, to give a maximum rather than a minimum protection to the rights of the individual.

It will then apply two limits: the right protected must be viewed in the light of the social function in question, and therefore subject to limitation on the grounds of public interest, provided that the substance of the right infringed is left untouched[95]. Secondly, the sphere of influence of Community law is itself subject to the limits imposed by the Treaty. Outside of the structures and objectives contained within the Treaties, the ECJ has no jurisdiction and therefore cannot protect fundamental rights which are unrelated to the objectives of the Community[96]. The ECJ has tried to develop an optimum standard of fundamental rights by maximising individual freedom derived from a number of sources and then applying the limits of its own jurisdiction and the test of Community or public interest.

The ECJ is developing a package of fundamental rights within the confines of the Community objectives. It is deriving them from a number of sources which tend to maximise the protection of the individual's fundamental rights. The Court's teleological reasoning and functional flexibility will allow it to develop and expand individual rights should it wish to do so. Indeed the Court's jurisprudence in other fields suggests that the limits of Community competence would not fetter the ECJ if it chose to ignore them because the Community competence is ever-expanding. Furthermore, it may well be that the idea of a list of Community objectives to which fundamental rights must be connected before they can be protected by Community law is conceptually unworkable and, as a result, this limitation (to be defined by the ECJ) is more apparent than real. It was seen in Defrenne how an objective which could be seen in human rights terms, equal pay for equal work, could equally be characterised as an economic imperative. Such a "grey area" may easily be exploited by a functionally-minded court.

ENDNOTES - CHAPTER 4

1. Cappelletti and Galay, "The Judicial Branch in the Federal and Transnational Union", in Integration Through Law (1985) Vol. 1, Bk. 2, at 348.

2. This section is only intended as a brief introduction of the subject. For a more detailed exploration of the various interpretative techniques used by the ECJ see A. Bredimas, Methods of Interpretation and Community Law (1978).

3. The importance the ECJ attaches to interpretation can be seen by the fact that three out of five papers delivered at the ECJ Judicial and Academic Conference in 1976 were devoted to it.

4. Case 1/54, [1954-6] ECR 45.

5. Case 13/61, Ge Geus v Bosch [1962] 1 CMLR 1, at 23.

6. See e.g. Case 26/62 Van Gend and Loos [1963] ECR 1, Case 32/65, Italy v Council and Commission [1966] ECR 389.

7. Judge Kurtcher, "Methods of Interpretation as Seen by a Judge at the Court of Justice", in Judicial and Academic Conference 1976, at I-39.

8. S. Schepers, "The Legal Force of the Preamble to the EEC Treaty", (1981) 6 E.L. Rev. 356. Paragraph 5 of the Preamble reads:
"Anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions."

9. "The European Court of Justice" [1984] I.C.L.Q. 409, at 416.

10. See Judge Kutscher, supra, n.7, at I-31. The ECJ justifies its refusal to accept that the interpretive principles applicable to ordinary international law are binding upon it by stressing the sui generis nature of the EC, see infra 4.2.

11. See Commentary on Article 27, Draft Articles ILC. Advisory Opinion on Reparation for Injuries Suffered in the Service of the UN. [1949] ICJ 174.

12. Case 14/68, Walt Wilhelm v Bendeskartellamt [1969] ECR 1, (summary at 1).

13. Case 22/70, Commission v Council (ERTA) [1971] ECR 263, at 275.

14. See P. Reuter. Introduction to the Law of Treaties 1989), at paragraph 144.

15. C.M. Lawson "The Family Affinities of Common-Law and Civil-Law Legal Systems," (1982) 6 H.I.C.L.R. 85.

16. Case 3/54, ASSIDER v High Authority [1954-56] ECR 135.

17. Case 17/74, Transocean Marine Paint Association v Commission [1974] ECR 1063.
The Court accepted Advocate General Warner's view that the principle of audi alteram partem was a general principle of Community law despite the fact that it was unknown to Dutch and Italian law.

18. Case 155/79. AM and S Europe Ltd. v Commission [1982] ECR 1575, at 1610.

19. See Judge Kutscher, supra, n.7, at I-38.

20. Id.

21. Infra, 4.2.1

22. Infra, 4.2.2

23. See G. Bebr, Development of Judicial Control of the European Communities (1981), at 619 for the survey of the treatment of international treaty law in the first nine member states from which the following descriptions are taken.

24. Case 26/62, N.V. Algemene Transport - en Expedite Onderneming Van Gend en Loos v Netherlands Inland Revenue Administration [1963] ECR 1.

25. Case 6/60, [1960] ECR 559.

26. Id., at 569.

27. Infra, 4.2.2.1

28. Supra, n. 24, at 13.

29. Id., at 12.

30. Case 6/64, Flamino Costa v ENEL [1964] ECR 585. [1964] CMLR 423.

31. Costa C. ENEL & Soc Edisonvolta, Judgement No. 14 of March 7, 1964, 87 FORO ITALIANO 1, at 465.

32. Supra, n. 30, at 605.

33. Id., at 593.

34. Id., at 605.

35. Rep in (1969) 63 A.J.I.L. 875.

36. See the use of the ECHR, in e.g. Case 29/69 Stauer [1969] ECR 419; Case 4/73 Nold [1974] ECR 491; Case 118/75 Watson and Belmann [1976] ECR 1185.

37. Supra, n. 12.

38. Id., at 15.

39. Supra, n. 25.

40. Case 11/70, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.
For the background to this important case, and its ramifications for Community law as a whole, see infra 4.2.3.

41. Id., at 1134.

42. Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SPA [1978] ECR 629.

43. Id., at 643.

44. Id., at 644

45. BRB v Pickin [1974] 2 WLR 208, at 213.

46. Supra, 4.1

47. Bebr, supra, n. 21, at 549.

48. Supra, n. 24.

49. Advisory Opinion on the Jurisdiction of the Courts of Danzig, March 3, 1928, PCIS, Ser. B, No. 15, at 18.

50. Supra, n. 24 at 22.

51. Supra, 4.2.1.1.

52. Supra, n. 24 at 13.

53. Case 57/65, Alfons Lütticke GmbH v Hauptzollamt Saarlouis [1966] ECR 205.

54. See e.g. J Streiner [1982] 98 L.Q.R. 229; Winter [1972] 9 C.M.L. Rev. 425 Bebr [1970] 57 I.C.L.Q. 290.

55. E.g. EEC Article 13(2), 21(3), 54(2).

56. Case 9/70 Franz Grad v Finanzamt Traunstein [1970] ECR 825. Identical reasoning on similar facts is to be found in case 20/70, Transports Lesage & Cie v Hauptzollant Freiburg [1970] ECR 861, and case 23/70, Erich Haselhorst v Finanzamt Düsseldorf-Altstadt [1970] ECR 881.

57. Id. at 846.

58. Id. at 837.

59. Case 33/70, SACE v Italian Ministry for Finance [1970] ECR 1213.

60. Id. at 1223.

61. Case 41/74, Van Duyn v Home Office [1974] ECR 1337.

62. Case 163/73, Commission v France [1974] ECR 359.

63. Supra n.61, at 1340.

64. Supra n.61, at 1348.

65. Case 80/70, Defrenne v Belgium [1971] ECR 445.

66. Case 43/75 Defrenne v Sabena [1976] ECR 455.

67. Resolution of the Conference of Member States 30 December 1961.

68. Supra n.66, at 473.

69. Supra n.66, at 480.

70. Professor Hamson "Methods of Interpretation - A Critical Assessment of Results," in Judicial and Academic Conference 1976, at II-15.

71. Supra n.66, at 485.

72. Supra n.66, at 472.

73. Id.

74. Supra n.66, at 489.

75. Supra n.66, at 476.

76. E.g. Case 8/81, Becker v Finanzamt Münster - Innenstade [1982] ECR 53.

77. Case 152/84, Marshall v Southampton Area Health Authority [1986] ECR 723.

78. Case 19/81, Burton v British Railways Board [1982] ECR 555.

79. See infra 4.2.3.

80. Supra n.77, at 749.

81. Case 1/58, Stork v High Authority [1958-59] ECR 279.

82. Supra n.30.

83. Case 29/69, Stauder v City of Ulm [1970] CMLR 112.

84. Id. at 119.

85. Case 11/70, Internationale Handelsgesellschaft v EVGF [1970] ECR 1125.

86. Id. at 1134.

87. [1974] 2 CMLR 540.

88. Case 4/73, Nold v Commission [1974] ECR 491.

89. Id. at 507.

90. Case 36/75, Rutili v Minister for the Interior [1975] ECR 1219.

91. See infra 2.3

92. Case 130/75, *Prais* v *Council* [1976] ECR 1589.

93. Case 118/75, *Watson & Belmann* [1976] ECR 1185, at 1207.

94. *Allgemeine Gold* v *Customs and Excise* [1980] 2 All ER 138; *Kaur* v *Lord Advocate* [1980] 3 CMLR 79. See generally A. Drzemczewski. "The Domestic Application of the European Human rights Convention as European Community Law," (1981) 30 *I.C.L.Q.* 118.

95. *Supra* n.85.

96. *Supra* n.83.

91. See *infra* 2.3

92. Case 130/75, *Prais* v *Council* [1976] ECR 1589.

5. COMMUNITY LAW AND NATIONAL COURTS

It is an inherent feature of the preliminary reference procedure set up by Article 177 that the ECJ and national courts must acknowledge and accept their complementary roles. The ECJ must convince national courts of the legitimacy, moral and legal, of its rulings because it has no means of enforcement if national courts refuse to obey or faithfully implement the ECJ's decisions. If a national court receives an unpalatable ruling it can frustrate the intention of the ECJ. It will be less tempted to do so if it accepts the authority of the ECJ out of respect for and acceptance of the role of the ECJ in the Community and domestic legal systems.

The need for the ECJ to obtain and retain the cooperation of national courts is a policy factor it bears in mind in its deliberations and, therefore, acts as a restraining influence on judicial activism. This is not to say that the ECJ will refuse to "upset" national courts, merely that is only likely to do so when the conflict is over an important principle. The predilection of the ECJ towards deciding questions of principle in favour of Community law, but the case in favour of legitimate local interests has already been discussed.[1] The dialogue produced by the frequent and inevitable conflicts between domestic and Community law has itself produced many of the most important doctrines of the ECJ's jurisprudence - supremacy, direct effect, general principles of Community law and fundamental rights.

However, these doctrines are doctrines of Community law, concerned with a Community agenda and a Community constitution. It is fair to say that they are not unproblematic and the ECJ's view of the legal theory underpinning the relationship between domestic and Community law is not fully accepted by the domestic courts of several member states. This is because the ECJ has created a Community constitution in its own image. It started with a large area of discretion and constructed its constitutional castle on an overriding principle of uniformity throughout the Community.

National courts cannot do this. They do not have the power to sweep away their country's existing constitutional theory and replace it with a new grundnorm, specially adapted to incorporate the new, unique legal entity that is the Community. The problems that have arisen have been caused, in the main, by domestic courts' need to fit EC law into their existing constitutional systems. At times, this has appeared to be impossible and the domestic courts have rejected the theory offered by the ECJ - either refusing to implement a decision or faithfully implementing it on the basis of a different legal rationale.

The implementation of ECJ jurisprudence by national courts on an alternative basis should be recognised as the result of the constitutional constraints imposed on domestic courts by their own legal systems and should not, therefore, lead to criticism of the national court. It is only when such considerations lead to non-compliance with EC law that concern should be expressed - and in such cases, it will often be the member state, which has failed to revise its constitution, appropriately or at all, which is the real culprit.

5.1 **Non-Compliance**

There are a number of techniques which are available to the courts of member states which may (or may not) lead to non-compliance with Community law.

5.1.1 **Acte Clair and Refusal to Refer**

The doctrine of acte clair[2] is based on the presumption that if the meaning of a treaty provision is clear and obvious then there is no need for it to be "interpreted" by the ECJ and Article 177 is simply not applicable. At first sight, this seems eminently sensible, but it ignores the peculiar character of Community law, in particular the difficulties created by different authentic language texts[3], and the methods of interpretation used by the ECJ make it debatable whether the meaning of any Community provision can safely be pronounced as "clear" by a domestic judge.

If the ECJ has already interpreted a provision, then it may be acceptable to rely on the ECJ's own jurisprudence.[4] However, the ECJ is not bound by its own case law and domestic courts are not precluded from making further references if they believe the original decision was incorrect or might be amended in view of the particular facts in the new case.

The scope of EC law is still limited and it is a question solely for the domestic court whether or not the case before it raises an issue of EC law. The only remedy the Community would have in the face of a deliberate refusal to refer by a court of last instance would be a direct action by the Commission against the offending court's state for breach of Article 5. The political and public relations capital cost of such an action - questioning the impartiality, authority and competence of a domestic judiciary - is such that is unlikely to occur.

5.1.2 Other Methods of Non-Compliance

Apart from the application of acte clair and refusing to refer there are a number of techniques open to a national judge, consciously or unconsciously, to frustrate the implementation of Community law. These include misinterpreting an ECJ Article 177 ruling, an inherent possibility given the jurisdictions of national courts and the ECJ as defined in Article 177 itself, the application of inappropriate (mainly literal) techniques of interpretation to Community law and blatant defiance of the ECJ's jurisprudence.

5.2 The Evidence

In the following sections dealing with some of the direct conflicts and difficulties involving EC law and national courts, it is important to remember two things, lest the small areas of disagreement be allowed to obscure the overall picture of harmony. The faithful implementation of Community law based on a domestic constitutional, rather than European, rationale should not be criticised, and the initial evidence from quantative research into 30 years of preliminary references suggests that there is a remarkable degree of successful cooperation and a high quality dialogue between national courts and the ECJ via the Article 177 procedures.[5]

5.2.1 The Smaller Members

It appears that the judiciaries (and political establishments) of the smaller member states have been prepared to embrace Community law and its implications for their own constitutional systems with more enthusiasm than the "big four": France, Italy, Germany and the U.K., who have moved more gradually towards full acceptance of Community law and sometimes appear to be fighting a rearguard action against it. States which combine a small territory, a small population and a lack of economic power in comparison to the rest of the Community, are not capable of effective unilateral action to achieve their objects. They are forced to rely on their multilateral arrangements and, consequently, have an additional incentive to comply faithfully with their international and, by extension, Community obligations.[6]

The courts of the Netherlands tend not only to automatically give priority to Community law over national law, but do so on the basis of the ECJ's jurisprudence, rather than the Netherlands' own 1983 constitution.[7] Indeed, the approach of the ECJ to the relationship between the EC Treaties and national law may have influenced the application of that relationship to other international treaties by Dutch courts.[8] Similarly, judges in Belgium appear to accept in toto the jurisprudence of the ECJ, even going so far as to apply a monist construction to Community obligations, rather than Belgium's traditional dualist approach to international law, in order to ensure the supremacy of Community law.[9]

Greece is a comparatively recent addition to the Community and, as did every other country, experienced (and is still experiencing) some practical problems with the wholesale integration of Community law into its domestic system. The unfamiliarity of both lawyers and judges with the Community system undoubtedly led to an initial reluctance to invoke European law in the national courts. The Greek judiciary appears to be adopting a constitutional approach which conflicts with the ECJ's jurisprudence, although the effect is to confirm the supremacy of Community law and to accept the practical legal consequences of direct effect.[10]

Article 28 of the Greek Constitution of 1975 provides that international treaties, once implemented and in force, form an integral part of Greek law and prevail over any contrary domestic law. The implementing measure for the Treaty of Accession 1979 was Law 945/1979 which provided that the Treaty should be implemented in accordance with Article 28. As a result, Greek case law, in accordance with the structure of the Greek constitution and legal system, tends to refer to Article 28 of the Constitution and the implementing law, rather than the sui generis nature of the Community expounded by the ECJ, as the basis for the supremacy of Community law over domestic constitutional structures.[11] This divergence of views may be inevitable given the constitutional constraints under which the Greek courts operate but until and unless it leads to Greek non-compliance with Community law the Greek judiciary, although possibly not her political establishment, should not be criticised.[12] However there have, as yet, been no cases concerning a direct conflict between Community law and the Greek constitution. When such a conflict arises its solution will be crucial for the development of Community law in the domestic legal system. Overall it appears that Greece in general, and her courts in particular, are at least attempting to come to terms with their Community obligations:

> ... Greece has experienced a rather smooth adjustment to the application of Community law ... courts adhered to the fundamental principles of Community law without any resistance ...
>
> Furthermore courts are still lacking ... the necessary experience for an effective application of Community law rules and for a rational co-operation with the European Court. All in all, however, Greece has displayed considerable adjustment capabilities to the Community law phenomenon.[13]

Denmark has traditionally been more cautious in its approach to European integration than some of its fellow members. This cautious approach may explain the "restrained use of the Article 177 procedure by the Danish courts".[14] Irrespective of this, overall Denmark has a good record of compliance with Community law generally and with implementing Article 177 references in particular.[15]

However, Rasmussen[16] suggests that this positive picture may be superficial and the reality more problematic. He argues that the Danish social, political and legal culture is particularly suspicious of judicial activism and ambivalent about the Community and its law generally. He suggests that the political and legal establishment have, as a reaction to the perceived activism of the ECJ, tended to avoid raising issues of Community law, preferring to adopt domestic legal or non-litigious approaches rather than give the ECJ the opportunity to expand the scope of Community law with particular reference to Denmark. This tendency helps to explain the low level of referrals from Danish courts. Indeed it is arguable that the very act of making an Article 177 reference demonstrates the acceptance by the domestic court of the jurisdiction and authority of the ECJ,[17] and that therefore any study of non-compliance should disregard Article 177 references and concentrate on cases which were not referred or in which

Community law issues were not canvassed. However, no systematic study of such cases has been attempted and so much of the evidence for Rasmussen's ideas must remain supposition and anecdotal.[18]

Irish courts all appear to accept the authority and jurisprudence of the ECJ although, like Denmark, the number of Article 177 references is comparatively small.[19] However, one potentially explosive Irish case needs a little explication. On the day that the Irish President signed the Single European Act an Irish citizen, Mr. Crotty, obtained an injunction preventing the instrument of ratification being deposited on the grounds that the Act was unconstitutional.[20] It was argued that the increased competence conferred on the EC by the Act exceeded the authority given by the constitutional amendment which had allowed Ireland to join the Community and that, therefore, a referendum on the Act was required. A referendum was held on 26 May, 1987 and the requisite amendment to the Irish Constitution was duly passed. The point to stress here, however, is that although this was a legal issue involving the Single European Act it was not a conflict with Community law generally or with the ECJ at all. If Ireland had not ratified the Act because of constitutional difficulties the problem created for the EC would have been political rather than legal. The high profile of the case should not be allowed to suggest that the Irish Courts were demonstrating a reluctance to comply with Community law.

5.2.2. **West Germany**

The background to and the effects of the decision in Internationale Handelsgesellschaft 1970 concerning a potential conflict between the German constitution and Community law have already been discussed.[21] It will be remembered that the German constitutional court (FCC) refused to accept the supremacy of Community law because of the "democracy deficit" and the lack of any express protection in the Treaties for fundamental rights. In 1979, as a result of the ECJ's developing jurisprudence in response to Internationale Handelsgesellschaft and the first direct elections to the European Parliament, the FCC suggested that it might be prepared to modify its position:

> The Court leaves open whether and, if so, to what extent - for instance, in view of political and legal developments in the European sphere occurring in the meantime - the principles contained in its decision of 29 May, 1974 [Internationale Handelsgesellschaft] can continue to claim validity without limitation in respect of future references of norms of derived Community law ...[22]

The FCC also accorded principles of law found to be part of the Treaty by the ECJ on an Article 177 reference the status of "primary" rather than "derived" Community law.

In a crucial decision in 1986, Wunsche Handelsgesellschaft,[23] the FCC finally acknowledged that Community law could not be challenged on grounds of incompatibility with the German constitution. It held that the ECJ was a "statutory court" as defined in the constitution with conclusive authority to interpret and pronounce on the validity of Community law.

Once the ECJ's status was established the FCC went on to discuss the circumstances, if any, in which the FCC had the authority to entertain challenges to the constitutionality of the ECJ's rulings. After a wide-ranging review of political and legal developments in the Community institutions, with particular reference to the rules of procedure of the ECJ and its fundamental rights jurisprudence, the FCC concluded that it could no longer legitimately claim competence to measure individual decisions of the ECJ or individual pieces of Community legislation against the yardstick of the German constitution. Its fall-back position is that if the ECJ were either:-

a) To ignore due process requirements to such an extent that the German Acts of Accession could be invalidated as no longer constitutional[24]; or

b) To fail to protect parties from abuse of the "sovereign powers" of the Communities or to "generally safeguard the essential content of fundamental rights;"[25]

then the FCC would regain jurisdiction to protect German citizens against the consequences of such abuses.

This effectively represents the final submission of the FCC to the supremacy of Community law and the authority of the ECJ. The theoretical future review of general Community law equates with the political reality that, irrespective of the ECJ's position regarding irreversible transfers of sovereignty, all of the member states would, if asked, claim a right to withdraw from the Community. It also demonstrates the legitimate need for national judiciaries to explain and justify their actions in terms of domestic constitutional law rather than by simply adopting the ECJ's approach.

The adherence of the FCC to this acceptance of the ECJ's authority was demonstrated recently in response to one of the few examples of blatant defiance of the ECJ's jurisprudence, in this instance by a German tax court. The case concerned a tax directive which Germany had failed to implement. This led to an Article 177 reference on the question of whether the directive had direct effect. The ECJ ruled that it did[26] and the German court accordingly granted the taxpayer an exemption. However, on appeal the Federal Tax Court held that, irrespective of the ECJ's decision, the directive could not be relied upon by individuals in German courts.[27] The appeal court held that Germany's accession to the EC had not transferred the power to legislate by directives in the absence of implementing German legislation. It pointed out that Germany had, in the trauvaux preparatoires, stated that a directive could not have direct effect and referred to the Conseil d'Etat's decision that directives could never, by their nature, have direct effect[28] to buttress its position.

These arguments were a legitimate part of the continuing debate about the direct effect of directives. However, the court was faced with an earlier ECJ decision as part of this piece of litigation! It justified its rejection of that decision by relying on Article 177 itself; the ECJ's function was to pronounce on Community law, not to assess its relevance or application. As the appeal court was applying German law, because the directive had not been implemented and could not have direct effect, the ECJ's decision was irrelevant.

The FCC disagreed. The directive was relevant and as it involved European law the ECJ was the court with jurisdiction to pronounce on it. The ECJ, not the Federal Tax Court, was therefore the taxpayer's "lawful judge" in terms of the German constitution and the Tax Court's refusal to either follow the ECJ's ruling or to make a second Article 177 reference (as it was obliged to do as a court of last instance in tax rather than constitutional law) was itself a breach of the German constitution. Accordingly the decision of the Federal Tax Court was annulled.[29]

5.2.2 **Italy**

Interestingly enough, the Italian Constitutional Court has chartered a course which is exactly opposite to that of the German FCC, at least in respect of fundamental rights. In Frontini 1973[30] the Constitutional Court adopted a position not dissimilar to that of the FCC in Wunsche Handelsgesellschaft.[31] It faced a challenge to the applicability in Italy of a regulation on the grounds that the regulation violated the Italian constitution. The Constitutional Court conducted an extensive review of the legal and procedural institutional system of the Community and concluded, somewhat naively, that the EC was restricted to economic relations and therefore:

> ... it appears difficult to form even abstractly the hypothesis that a Community regulation can have an effect in civil, ethico-social, or political relations through which provisions conflict with the Italian constitution ...
>
> It should therefore be excluded that such limitations of sovereignty ... signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberties of citizens can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man ... . If ever Article 189 had to be given such an aberrant interpretation in such a case the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles. But it should be excluded that this Court can control individual regulations ... [32]

Again the rationale is that the Court cannot review the constitutionality of Community acts, but does have the authority to review the constitutionality of the statute providing for Italy's membership of the Community. Therefore, if the Community system develops in such a way as to conflict with the constitutional protection of fundamental rights then the Court would assert its right to reassess the continued constitutionality of Italian membership because of that violation.

Frontini established the supremacy of Community law over domestic law in Italy. However, certain constitutional problems remained. Under the Italian constitution only the Constitutional Court could declare the invalidity of an Italian statute. This led to the Article 177 reference in Simmenthal (No. 2) 1977[33] in which the ECJ ruled that national judges must refuse to apply national legislation which conflicts with Community law.

Subsequently, the Constitutional Court has accepted this. In Granital 1984[34] the Court invoked, in language reminiscent of the ECJ, the need for uniformity of Community law in application and time within domestic systems. However, it noted that its own rationale, the existence of two independent and autonomous legal systems operating within distinct fields, differs not only from the monist view of the ECJ but also from the approaches of other member states:

> This assertion [the need for uniformity] is supported by two separate and concurring remarks. First of all, the Luxembourg Court also reached the same conclusion. It is true that it views the legal sources of Community law and of the member state's municipal law as integrated in one system

> only and therefore starts from different premises to those accepted in this Court's decisions. However, what really matters is that there is agreement between the two courts to the extent that direct and continuous effects must be ensured for Community secondary legislation of the type considered here. This supports the principle that Community regulations are always and immediately to be applied by Italian courts - the existence of conflicting provisions of municipal law notwithstanding.
>
> Moreover, as far as this court knows, in all the Member States' legal systems, Community regulations immediately apply to the exclusion of existing provisions - whether antecedent or subsequent - of municipal law, whatever reason is given in each Member State in accordance with its own Constitution.[35]

The Court repeated its fundamental rights position explained in Frontini but also retained for itself exclusive jurisdiction to rule Italian statutes invalid if they "intend to prevent or impair the continuous respect of the Treaty."[36] The decision itself is predicated on Italian membership of the EC representing a constitutionally acceptable transfer of sovereignty by the Italian legislature to the EC and this new reservation appears designed to allow the Constitutional court to control any subsequent legislative attempt at a reversal or derogation from that transfer. The possibility of a reversal is not denied, only the self-evident proposition that to be legally effective it would have to be constitutional. From this viewpoint, this area of supervision by the Constitutional

Court is focused more on the Italian Parliament than at the EC. The net effect of the decision is that:-

(a) Italy has transferred some legislative competence from her Parliament to the EC;

(b) Community law which is directly effective overrides Italian law, including the Italian constitution so long as the Community system continues to respect fundamental rights;

(c) Should the Italian legislature attempt (and attempt implies intent) to claw back a competence which has been transferred to the Community it may do so, but the Constitutional court will supervise any such attempt to ensure its constitutionality.

Again it is submitted that this merely represents judicial recognition of the political possibilities of withdrawal or deliberate contravention of the treaty and asserts that such actions must be procedurally and constitutionally lawful, but that the ultimate power to make political decisions of that nature rests with the legislature rather than the courts. This is not dissimilar to the solution the British Courts have found to the question of Parliamentary sovereignty.[37]

The Constitutional court has clarified its position following Granital and in general has done so in a manner which gives priority to Community law. It has confirmed that the Granital reasoning is not restricted to regulations and that decisions of the ECJ have their own binding effect on Italian courts faced with Community law.[38] However, the Constitutional Court has now proclaimed its right to subject individual decisions of the ECJ to review on the basis of the Italian constitution where fundamental rights are involved.[39]

The Court was concerned about the temporal effects of ECJ rulings about the validity of Community acts on Article 177 references. The ECJ has, on occasion, ruled on an Article 177 reference that a Community act was invalid but that the challenged act is to be treated as invalid for the future but valid up to the date of that ruling.[40] If such a case involved a fundamental right then the Constitutional Court envisaged the possibility that fundamental rights would be violated prior to the ECJ's ruling and that even a successful plaintiff would be refused a remedy for that violation. This could not be tolerated:

> In substance, everyone's right to have a court and judicial proceedings for each dispute would be emptied of its essential content if, when a court doubts the validity of a rule which should be applied, the answer came from the court to whom the question has to be referred, that the rule is in fact void, but that this should not be relevant for the dispute before the referring court, which should nevertheless apply the rule that is declared to be void.
>
> ... One could not invoke the primary need for the uniform application of Community law and for certainty of law against the possible violation of a fundamental principle.[41]

Although the actual circumstances envisaged are extremely unlikely to arise - a violation of fundamental rights by a Community act declared to be invalid by the ECJ for the future only - it is the willingness of the Constitutional Court to supervise individual Community acts, in this case the temporal effects of an ECJ ruling, rather than Community system of fundamental rights protection which recalls the position of the German FCC in Internationale Handelsgesellschaft.[42]

5.2.4. **France**

It has been in France that the authority of the ECJ and its jurisprudence has met the most resistance from a national judiciary. The Cour de Cassation, the supreme ordinary court, has been prepared to accept that Community law overrides prior or subsequent French statutes.[43] However, the Conseil d'État, the highest administrative court, has consistently challenged and rejected the ECJ's jurisprudence.

In 1968 the Conseil d'État held that a subsequent French provision took precedence over a regulation, which, it will be recalled, is a piece of "directly applicable" Community secondary legislation.[44] The Commissaire du Gouvernement, who fulfils a role similar to that of the Advocate General, made it plain that national judges were not free to ignore national law on the basis of the Treaty and, in particular, not on the basis that to do so would facilitate the development of the Community:

> If the legislator has manifested a precise will, if the national statute insinuates itself as a necessary intermediary between the Treaty and the application required of it, no provision of the [French] Constitution ... excuses the judge from respecting that will. It is difficult to imagine that there should be created in all the areas affected by an international treaty whole zones in which the laws would be deprived of effect by the judge, and on the basis of texts which he is not fully entitled to interpret. The argument is enticing in order to encourage the development of a Community legal order; its evolution is more difficult to imagine if it withdraws from the action of the legislator whole sections of the life of the country because treaties have appeared in the area in question[45]

The role of the Conseil d'État with respect to Community law was in its non-judicial capacity as advisor on draft bills. If a French law, once enacted, conflicted with Community law it should be challenged before the ECJ via Article 169; it could not be overruled by French judges.

At this stage the case law of the ECJ on supremacy and direct effect was not fully developed and Community law was still a relatively recent phenomenon, unfamiliar to domestic judges, and this dispute could be put down to teething. However, in 1980, in Cohn-Bendit[46], the Conseil d' État challenged the ECJ head on in circumstances which left no possible doubt that the ECJ's view of the relationship between national and Community law was totally rejected by the Conseil d' État.

Daniel Cohn-Bendit was born and lived in France, but was a German national. He was one of the leaders of the student unrest in France in 1968, which led to his deportation. Having been offered a job in France in 1975, he applied to have the deportation order rescinded, a request which was refused. The Tribunal Administratif de Paris made an Article 177 reference to the ECJ concerning the applicability and direct effect of Directive 64/221, which lays down substantive and procedural requirements which must be complied with by a state purporting to restrict the free movement of a Community worker. The Minister of the Interior appealed against the reference itself arguing that directives could not be relied on by individuals in national courts i.e. were incapable of having direct effect. By the time the matter came before the Conseil d' État the deportation order had been lifted and so there would be no practical consequences of the Conseil d' État decision. This makes the decision to render a judgement, particularly such a controversial one, appear to have been a calculated act of defiance.

The Commissaire du Gouvernement reviewed the text of Article 189 and the case law of the ECJ on the direct effect of directives and concluded, using the arguments based on a literal interpretation which had been consistently rejected by the ECJ, that directives which had not been implemented by the national authorities of a member state could never be relied on by an individual in the courts of that state.

However, although acknowledging that the logic of his own position required the Conseil d'État to rule against an Article 177 reference, the Commissaire argued that an Article 177 reference should be made asking different questions and inviting the ECJ to review or restrict its previous case law in view of the disquiet felt by the Conseil d' État at the ECJ's direct effect jurisprudence:

> Experience has taught us, even here, that a supreme court does not like reversing a case law which it has laid down, even though it may at times agree to modify it.
>
> I think all the same that the [ECJ] may not be entirely insensible to the remarks which its case law has called forth. It is not inconceivable that it will be induced to limit its scope to the case where a directive really constitutes a regulation or that it will be satisfied with the exercise by the national court of a supervision over the conformity with the directive of the national implementing act.[47]
>
> At the level of the European Community there should not be either rule by judges nor war between judges. There should be place there for dialogue between judges.[48]

The Conseil d'État flatly rejected this option:

> ... while these directives bind the member-states "as to the result to be achieved" and while to attain the aims set out in them, the national authorities are required to adopt the statute law and subordinate legislation and administrative practice of the member-states to the directives which are addressed to them, those authorities alone retain the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law. Thus, whatever the detail that they contain for the eyes of the member-states, directives may not be invoked by the nationals of such states in support of an action brought against an individual administrative act.[49]

Not only was the Conseil d' État prepared to categorically reject a well established line of ECJ case law but to ignore its own obligation under Article 177 to refer the question to the ECJ, presumably on the acte clair basis that the ECJ was clearly wrong!

The discrepancy between the attitudes of the Cour de Cassation and the Conseil d' État was demonstrated when effectively identical facts and ECJ decisions led to different results when the Cour de Cassation followed the ECJ and the Conseil d'État did not. These cases were those already mentioned as causing concern to the Italian Constitutional Court in which the ECJ ruled certain Community regulations to be invalid as to the future, but that money paid as a result of the invalid regulations could not be reclaimed.[50] The referring courts all took the view that their Article 177 questions had only concerned the validity or otherwise of the regulations, and that the ECJ had exceeded its jurisdiction by ruling on the effect of that invalidity. They ordered that the money be repaid.

On appeal, for purely technical reasons, one case went to the Cour de Cassation, which ruled that the ECJ's decision should be adhered to,[51] but the other two went to the Conseil d' État which held the opposite.[52]

The matter did not end there. In subsequent litigation concerning the same regulations, a specific question was asked in the Article 177 reference about the temporal effect of the ECJ's earlier rulings on the invalidity of the regulations. Hardly surprisingly the ECJ repeated its earlier ruling[53] that no money could be refunded. However, when faced on appeal with the parallel litigation before the administrative courts the Conseil d' État refused to follow the ECJ's ruling, on the grounds that it had no binding force because the reference was made in different litigation, and refused to refer a similar question to the ECJ.

It is clear that the Conseil d'État has adopted a policy of defying well established ECJ jurisprudence and claiming to apply acte clair in extremely doubtful circumstances if it believes that an Article 177 reference would lead to an ECJ decision which the Conseil d' État did not wish to apply or to a further expansion of the competence claimed for itself and the Community by the ECJ.

This defiance by the Conseil d'État caused some academic consternation and debate as to the reasons for it and its possible consequences for Community law as a whole. Bebr, for example, finds the Cohn-Bendit case a dangerous abuse of authority and the doctrine of acte clair by the Conseil d' État,[54] while Rasmussen argues that the decision, or a similar one, was the inevitable result of the unwarranted activism of the ECJ.[55] France does have the highest "incidence of deviation" from the ECJ Article 177 references according to the Florentine Project, but strict compliance is still the norm (80% conformity as contrasted with 13% deviation),[56] although the comparatively low number of references may give credence to the idea that technical questions are referred and the rulings received are adhered to, whereas constitutional questions concerning the relationship between Community law and French law are not referred because of the possibility of an "unfavourable" response.

However, there are signs that the resistance of the Conseil d' État to the ECJ's authority may be being overcome. In Nicolo 1990, the Commissaire du Gouvernement commented:

> Finally, it is quite shocking ... that citizens cannot rely before the French administrative courts, on a regulation which they would be allowed to rely on in other countries of the Community, solely on the ground that, in our country the regulation has been set aside by a contrary statute. There is indeed a difference in treatment which is difficult to reconcile with the very principles of Community law.[57]

There is an interesting concentration here on political and judicial reality (the Commissaire noted that the Conseil d' État was the last court in the Community to refuse to apply Community law as a result of a conflict with subsequent national legislation) rather than legal technicalities. The wording of Article 189 has not changed and the Article is primarily a procedural device describing the various types of Community legislation, rather than an expression of principle. "The very principles of Community law" are uniformity, supremacy and direct effect; the very ECJ-made doctrines to which the Conseil d' État has consistently objected. It is also worth commenting that, yet again, important issues of Community law are being raised and discussed in a case in which the point of principle at issue is unnecessary for the decision required, these matters seem merely to come to fruition. The implications of this ruling, therefore, should not be viewed as merely applying to regulations and subsequent legislation but indicate that the Conseil d' État is finally prepared to accept the ECJ's jurisprudence and comply with its Community obligations.

5.3 **The United Kingdom - A Common Law Approach**

Lord Denning, in his own inimitable style, has charted the influence of Community law within the English legal system since Britain joined the Community. His final repudiation of the ECJ's case law, whilst it reflects at the time of publication a political controversy over the ECJ's decision in Factortame 1990,[58] does not appear to have been adopted by his former colleagues:

> ... when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute. (1974)[59]
>
> ... the flowing tide is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water. (1978)[60]
>
> ... the tide is advancing. It is no use our trying to stop it, any more than King Canute did. He got his feet wet; I expect we shall all get our feet wet too. (1979)[61]
>
> No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses - to the dismay of all. (1990)[62]

5.3.1 **Parliamentary Sovereignty and the European Communities Act 1972**

Unlike the other member states of the Community, Britain does not have a written constitution. Two particular consequences of this for the integration of Community law into British law are that effective membership, and consequent legal integration, could not be achieved by means of a formal constitutional amendment, and that the idea of a hierarchy of norms, in which legislation is judicially examined to see if it conflicts with a "higher" law is one which is less familiar to the British legal establishment than to her continental counterparts.

The base of the unwritten constitution is the doctrine of Parliamentary sovereignty. Parliament is competent to legislate on any subject in any place whatsoever, and the judiciary must strive to give effect to that legislation. Any other body exercising a law-making power for the U.K. derives its authority from Parliament and is subordinate to it. Therefore, a British judge cannot pass judgement on the validity of a statute, and no Parliament can bind its successors. This is the paradox of Parliamentary sovereignty; if a Parliament cannot entrench its legislation it is not truly omnipotent; if it can, then power of a future Parliament to legislate is restricted, and so it, in its turn, is not truly sovereign.

That this is something of a legal fiction has long been recognised:

> It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired ... But that is theory and has no relation to realities;[63]

but it remains pervasive. In reality, the limits on Parliamentary action are political, diplomatic, economic, and social but in the legal field the Vice-Chancellor in 1982 was still prepared to state that:

> ... it is a fundamental of the English Constitution that Parliament is supreme. As a matter of law the courts of England recognise Parliament as being omnipotent in all save the power to destroy its own omnipotence.[64]

The difficulty which this raises where the EC is concerned is that, with two acknowledged law-making bodies, conflicts and inconsistencies between the law created by each are likely if not inevitable and, in view of the nature of Community law and the ECJ's jurisprudence, the conflict cannot be resolved by giving effect to the later law on the basis that the prior law has been impliedly repealed. Therefore, British judges may at some point be required, either on their own initiative or following an Article 177 reference, to disregard an act of Parliament, an action which would strike at the very roots of Parliamentary sovereignty.

If past and, more problematically, future Community law was to take precedence over Parliamentary statutes passed after the relevant Community law then either an explicitly recognised change in the constitutional structure of the U.K.

or some novel drafting was required. The outcome was the European Communities Act 1972, which is the implementing statute for the Treaty of Accession.

Section 2(1) provides that:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ... (emphasis added)

Even more importantly Section 2(4) specifies that:

> ... any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions ... (emphasis added)

The Act also provides for the use of Community material in legal proceedings and imposes an obligation on U.K. courts to either refer questions of interpretation to the ECJ or to decide "in accordance with the principles laid down by and any relevant decision of the European Court."[65] In a system based on precedent, the statutory imposition on the courts of an obligation to be bound by the case law of a "foreign" court was inevitably going to discourage any blatant defiance of the ECJ and certainly no revolt comparable to that of the Conseil d' État has been promulgated by the English courts.

Section 2(1) incorporates the Treaty and Community secondary legislation, irrespective of its date, into the English legal system and Section 3(1) incorporates the ECJ's jurisprudence into the precedent system. When Community law and national law conflict, Section 2(4) lays down a rule of construction which should provide for the supremacy of Community law. This was an ingenious solution and also a subtle one, it was not (and is not) beyond the bounds of possibility that a future Parliament might seek to detract from or avoid its Community obligations when legislating and by means of Section 2(4) Parliament appeared to ensure that the effect of such an attempt would be determined as a technical, internal legal/constitutional question in the judicial arena rather than examined in the full glare of publicity attached to the political stage. The legislative approach was novel and the reaction of the judges when faced with a conflict between a subsequent statute, with full Parliamentary authority, and a mere rule of construction contained in a previous statute could not be predicted with any degree of certainty.

5.3.2 **An Iron Rule?**

The judges have responded in a communitaire fashion, and in doing so have insisted that if Parliament wishes to ignore or avoid its Community obligations it must do so as a conscious and public political act, with all the diplomatic consequences which that may entail, rather than expect the judges to give effect to any such intention when the legislation comes to be interpreted in a judicial forum. A forum which is less public, tied to the facts of a particular case and, in England at least, politically less likely to be criticised because of the generally high regard in which judges and the legal system are held.

Despite English law's dualist approach to international law, English courts endeavour to comply with the state's international obligations unless the wording of a statute is such that it appears that Parliament intended to disregard the treaty or other international obligation.[66] Building upon this, and with the added support of the statutory rule of construction contained in section 2(4) of The European Community Act 1972, the courts have suggested that they are prepared to distort, almost beyond recognition, the language of domestic legislation to avoid any inconsistency with Community law unless and until Parliament expressly instructs them not to do so.

Although the cases appear at first sight to be somewhat inconsistent, it is possible to discern three different scenarios, each of which leads to a slightly different approach by the courts depending on whether or not the Community law is directly effective and the purpose of the relevant English provisions.

Many questions of Community law arise in the field of employment law and it was in the Employment Appeal Tribunal that Phillips, J. began to develop the approach which has subsequently been appropriated by the higher courts in a case involving Article 119 of the Treaty, which the ECJ had already held to be directly effective:

> ... the correct approach is to give effect to Defrenne v Sabena by construing and applying the [Equal Pay] 1970 Act in conformity with Article 119. In this way it will be unnecessary for a claimant to make a separate claim specifically under Article 119 and it will be understood that a claim under the 1970 Act will entitle a claimant to any remedy which he could claim under Article 119, inasmuch as the 1970 Act is to be so construed and applied ...
>
> ... we have taken the view that it is right to construe the 1970 Act broadly having regard to its object. Any doubt as to the propriety of this method of construction and application of the 1970 Act seems to us to be set at rest by reflecting

> that ... there is an obligation to apply Article 119 directly in the courts of the member states. As it seems to us, it is only by so construing and applying the 1970 Act that it is possible to honour this obligation.[67]

In 1979, in a case which led to the first Article 177 reference from the Court of Appeal, Lord Denning was also faced with a possible conflict between the provisions of the Equal Pay Act 1970 and Article 119. He was in no doubt as to the correct approach:

> In construing our statute, we are entitled to look to the Treaty as an aid to its construction; but not only as an aid but as an overriding force. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament ... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.[68]

His colleagues adopted a more cautious approach and, whilst acknowledging that Community law would take precedence in the event of a conflict, referred the matter to the ECJ for advice on the requirements of Article 119, rather than construe the Equal Pay Act 1970 in such a way as to accord with the principle of the article.

Lord Diplock favoured Lord Denning's approach in an influential passage, which has been the starting point for most subsequent decisions, and which includes the germs of the three different approaches to Community law which can be identified:

> My Lords, even if the obligation to observe the provisions of art 119 were an obligation assumed by the United Kingdom under an ordinary international treaty or convention and there were no question of the treaty obligation being directly applicable as part of the law to be applied by the courts in this country without need for any further enactment it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonable capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it. A fortiori is this the case where the treaty obligation arises under one of the Community treaties to which S.2 of the European Communities Act 1972 applies.
>
> The instant appeal does not present an appropriate occasion to consider whether, having regard to the express direction as to the construction of enactments 'to be passed' which is contained in S.2(4), anything short of an express positive statement in an Act of Parliament passed after 1 January 1973 that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency.[69]

Statutes are to be construed in accordance with U.K. treaty obligations if they are "reasonably capable" of being so construed. This rule of construction carries particular weight when it is a Community obligation, which is not restricted to a direct treaty obligation but covers all obligations arising under the Community treaties, which is at issue. This case also concerned Article 119, which is directly applicable, and Lord Diplock refused to consider whether anything short of an express repudiation of the relevant Community law by Parliament would displace the presumption of conformity. However, that approach has Lord Denning's support and as Lord Diplock noted the instant case did not require the matter to be addressed at all. Such discursive _obiter_ are often used by judges to express a preliminary view whilst reserving the right to change their position following full argument. Subsequent cases in the U.K. have not raised the point directly and developments both within and outside of the U.K. have made it less likely that a direct conflict will arise before the U.K. courts. However, it is submitted that, in cases in which directly effective Community law is at issue, U.K. courts will _always_ construe British legislation in such a way as to conform with Community law "however wide a departure from the prime facie meaning of the language of the provision might be needed" unless the legislation contains an express repudiation of the relevant Community obligations.

This approach, always interpreting domestic law in such a way as to give effect to Community law was an attractive one from the point of view of the ECJ. If other national courts could be persuaded to follow it then the number of direct conflicts between national law and Community law would be reduced and national courts would be called upon less frequently to ignore or invalidate national law. These are the high profile cases which most often lead to criticism and hostility from both national politicians and national courts. If national courts were to adopt a more flexible approach to their domestic law the apparent effect would be a devolution of power to the national courts, which would explain their decisions on the basis of national law being applied in the light of Community law, rather than national law being overruled by a superior but "foreign" court. These policy factors and the Conseil d'État's defiance, which demonstrated potential limits to the ECJ merely pronouncing the law and expecting its rulings to be followed, may have influenced the ECJ when it gave its wholehearted support to Lord Diplock in Von Colson v Land Nordrhein-Westfalen 1984.[70]

> However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No. 76.207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189. ...
>
> It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.[71] (Emphasis added)

It was only two years after Von Colson that the ECJ finally settled the question of the "horizontal" direct effect of directives by holding that individuals could not rely on directives in national proceedings against private entities in Marshall,[72] when, as has been pointed out, the decision was not required by the facts of the case. This suggests that it was only after directives and, therefore individual Community rights, had been given the boost to their effectiveness in national legal systems by the ECJ in Von Colson that the ECJ was prepared to backtrack, at least in part, on its previous insistence that direct effect was based on the effet utile rather than estoppel, so that nature of the "offending" entity, be it state or private, was irrelevant.

The position is still unsatisfactory and anomalous from the point of view of the uniformity of Community law because the Von Colson principle is only likely to be applied where the member state has at least attempted to implement the Community measure. However, failure to implement a directive is more likely to lead to a Commission Article 169 action than inadequate implementation. Secondly, if as appears likely, the ECJ was concerned about the Conseil d' État's attitude in Cohn-Bendit[73] and wished to find an acceptable compromise with the national critics of its jurisprudence it seems to have succeeded. The effect of Von Colson and Marshall is to place on national courts the responsibility of ensuring compliance with Community law by use of national judicial techniques in accordance with the domestic constitutional structure whilst decreasing the ECJ's direct role in conflicts between Community and national law. The Conseil d' État's decision in Nicolo[74], in which the Commissaire du Gouvernement told the Court that "you still have the very useful resource of interpretation which will enable you, so to speak, to 'remove the conflicting elements from the relevant provisions'. In this way you will quite often be able to consider that a statute which is apparently contrary to a treaty will, in reality, have been intended to allow for cases where the latter may apply," suggests that it is prepared to accept this revised apportionment of the respective responsibilities of national courts and the ECJ.

Up to this point the leading English cases (including Marshall and Garland) had involved Article 119; i.e. a directly effective Treaty provision. The English courts have subsequently seized on the ECJ's reflection in Von Colson of Lord Diplock's approach to determine the status of directives in English law. In Pickstone v Freemans PLC 1988[75] the Equal Pay Directive (75/117) was at issue. The Commission took action against the U.K. on the grounds that the Equal Pay Act 1970 (which came into force on 29 December, 1975) did not comply with the obligations contained in Article 119 and the Equal Pay Directive. After the ECJ ruled against the U.K.[76] the government, with the stated intention of remedying the situation, introduced the Equal Pay (Amendment) Regulations 1983.[77] Female "warehouse operatives" at Freeman's claimed that their work was of equal value to that of male "warehouse checkers", which entitled them to equal pay under Community law. However, Freeman's argued that they also employed male "warehouse operatives" at the same rate of pay as the female "warehouse operatives" and that, under the Regulations, this meant that they could not claim pay parity with male "warehouse checkers" irrespective of the respective value of the work each was doing. On the wording of the Regulations (and, following Marshall, the directive was not directly effective in this case) this contention appeared to be well founded and had found favour in the Industrial Tribunal and the Employment Appeal Tribunal.[78] The Law Lords reviewed the legislative and litigious history of the Regulations and took the unusual step of consulting Hansard to ascertain the object of the Regulations on the pretext that statutory instruments are not subject to the full Parliamentary procedure, and, therefore, are not as precise an expression of the Parliamentary will as a statute.[79]

The object of the Regulations and of the relevant Community law weighed heavily with Lord Keith when, in a short functionalist judgement, he commented that if the employers succeeded the U.K. would "yet again" have failed to fulfil its Community obligations:

> It is plain that Parliament cannot possibly have intended such a failure ... It may be that, in order to confine the words in question to that situation, some necessary implication falls to be made into their literal meaning. The precise terms of that implication do not seem to me to matter. It is sufficient to say that the words must be construed purposively in order to give effect to the manifest broad intention of the maker of the regulations and of Parliament.[80] (Emphasis added.)

Lord Oliver (one of two judges to confess to having been persuaded by their colleagues to alter their views), whilst adopting a less broad brush approach than Lord Keith, made it plain that the literal wording of the Regulations had been overridden by more expansive, global considerations:

> ... I am satisfied that the words at S.1(2)(c), whilst on the face of them are unequivocal, are reasonably capable of bearing a meaning which will not put the United Kingdom in breach of its treaty obligations. This conclusion is justified, in my judgement, by the manifest purpose of the legislation, by its history, and by the compulsive provision of S.2(4) of the 1972 Act. It is comforting indeed to find, from the statement made by the minister ... that this construction does in fact conform not only with what clearly was the parliamentary intention but also with what was stated to be the parliamentary intention.[81]

The case of Litster v Forth Dry Dock Co. Ltd. 1989[82] demonstrates the lengths to which the House of Lords is prepared to go to interpret implementing legislation so as to give effect to Community obligations. Directive 77/187 is an employment protection provision aimed at safeguarding the rights of employees on the transfer of a business to new owners entailing a change in the identity of the employer, a particularly common example of which is on the insolvency of a company, when the business is sold as a going concern to maximise the return to creditors of the insolvent company. The directive provides that in such a situation the obligations of the employer to the employees pass to the transferee rather than remain enforceable only against an insolvent company with, therefore, no real prospect of any compensation. It was implemented in the U.K. by the Transfer of Undertakings (Protection of Employment) Regulations 1981[83] which, in an unfortunate piece of drafting, apply to persons employed "immediately before" the transfer. In Litster the parties colluded so that the workforce was dismissed by the receiver at 3:30 p.m. and the transfer of the business to the new owners took place at 4:30 p.m. The transferee then argued that the Regulations did not apply as the employees had not been employed immediately before the transfer, which, given the ordinary meaning of "immediately," is clearly correct.

Lord Oliver commented that such a result would again lead to the conclusion that the U.K. had failed to comply with her community obligations:

> If your Lordships are in fact compelled to that conclusion, so be it; but it is not ... a conclusion which any of your Lordships would willingly embrace in the absence of the most compulsive context rendering any other conclusion impossible.[84]

The solution adopted by the court to avoid this unacceptable result was to imply into the regulations the words "... or who would have been so employed if he had not been unfairly dismissed before the transfer for a reason connected with the transfer."[85]

The addition to a legislative provision of a sentence of twenty four words creating rights for a group of employees excluded from the actual wording of the Regulation is more accurately characterised as judicial re-writing of the legislation than as construction of the provision, however purposive.

However, where directly effective Community law is not involved (and following Marshall the number of instances in which it is relevant to private litigation have been reduced) and there is no indication that the relevant U.K. law was introduced as a result of a Community obligation (primarily in the case of directives), the courts adopt a more traditional approach. The facts in Duke v GEC Reliance Ltd. 1988[86] were virtually identical to those in Marshall except that the employer was in the private rather than the state sector. It had been believed that discriminatory retirement ages were permitted under Community law, but the ECJ held in Marshall that they were contrary to Directive 76/207. Following that decision the U.K. passed the Sex Discrimination Act 1986 amending the Equal Pay Act 1970 and the Sex Discrimination Act 1975 to conform with the ECJ's ruling on its obligations under Directive 76/207. However, Mrs. Duke was forced to rely upon the English law prior to the 1986 Act and could not rely on the 1976 directive because it had no horizontal direct effect. She therefore argued that the 1970 and 1975 Acts must be construed in such a way as to comply with the later directive as interpreted by the ECJ in Marshall.

Lord Templeman, who adopted the most pro-Community approach in both Pickstone v Freeman and Litster, flatly rejected this argument. He reviewed the history of the relevant pieces of national and Community legislation and discussed the social and economic reasons for the maintenance of discriminatory retirement ages, which, he concluded, had been a deliberate policy of the British Parliament. He explained that:

> Of course a British court will always be willing and anxious to conclude that United Kingdom law is consistent with Community law. Where an Act is passed for the purpose of giving effect to an obligation imposed by a directive or other instrument a British court will seldom encounter difficulty in concluding that the language of the Act is effective for the intended purpose. But the construction of a British Act of Parliament is a matter of judgement to be determined by British courts and to be derived from the language of the legislation considered in the light of the circumstances prevailing at the date of enactment ... The Acts were not passed to give effect to the equal treatment directive and were intended to preserve discriminatory retirement ages.

> ... Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British Court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals. Section 2(4) applies and only applies where Community provisions are directly applicable.[87]

Note also the opposite implication of this view of Section 2(4) - that where directly effective Community law is to be applied, Section 2(4) does enable a court to "distort" the meaning of a statute.

It was confirmed in Finnegan v Clowney Youth Training Programme Ltd 1990[88] that Community law which was not directly effective should be approached in a traditional manner, with the key being the intention of Parliament rather than the chronology of the legislation. The equivalent provisions in Northern Ireland to those at issue in Duke v GEC 1986 had, as is customary, been enacted in language identical to that of the English legislation. However, they were not passed until after the equal treatment directive had been adopted. The House of Lords held that the identical wording showed an identical intention in Parliament, and that it would be artificial to treat them as evincing an intention to comply with the directive merely because of the respective dates of enactment.

5.3.3 **The Three Approaches**

To summarise it appears that the current position is that U.K. courts will:-

a) Always construe domestic law from whatever source to be in conformity with directly effective Community law, however much violence to the language of the domestic law is required, unless and until Parliament repudiates the European Communities Act 1972 or expressly provides in a piece of legislation that it overrides Community law;

b) Construe domestic law which is intended to implement Community law in accordance with Community law. Whilst this presumption of conformity is not as absolute as when dealing with directly effective Community law, the courts have shown an astonishing willingness to embrace purposive techniques of interpretation by altering and adding to the wording of the legislative provisions;

c) Where Community law which is not directly effective is relevant, but the provisions to be interpreted were not intended by Parliament to implement it,

> apply the normal U.K. approach to international law. Any ambiguity will be construed so as to give effect to the Community law but the ordinary meaning of the words of the domestic provision will not be distorted to do so.

Parliamentary sovereignty has been preserved by the ultimate possibility of the repeal or amendment by Parliament of the European Communities Act 1972 or by specific instructions to the courts to disregard Community law when interpreting or applying any particular legislative provision. The constitutional theory is therefore sustained and the responsibility for any future reconsideration is placed squarely in the political rather than the legal arena. The approach of the U.K. courts has been adopted and encouraged by the ECJ in order to minimize the risk of future direct conflicts with national judiciaries. The practical result is that the British legal system will comply with Community law, notwithstanding that its approach is one which is in accordance with the British constitution, rather that in accordance with the jurisprudence based on the *sui generis* nature of Community law consistently expounded by the ECJ.

5.3.4. **The Final Nail?**

The EC's common fishing policy is intended to preserve fish stocks and protect local fishing industries. It fixes quotas for the national fleets of each member state. However, "quota hopping", particularly by Spanish interests in British waters, had distorted the effects of the policy. The U.K. made several attempts to prevent "quota hopping"[89] which culminated in the passing of the Merchant Shipping Act 1988. The Act was intended to protect British fishing interests by requiring that members of the British fleet for the purpose of the British quota have a genuine economic link with the U.K. It was clearly aimed at prohibiting fishing in British waters by companies which are registered in the U.K. but are owned and controlled by Spanish nationals.

The affected companies challenged the validity of the legislation on the grounds that it contravened Community law. An Article 177 reference was made to the ECJ from the High Court as it was clear that there were strong arguments in favour of each party to the litigation:

> ... I do not propose to express even a tentative view of the likely result ... but neither side's arguments in my judgement can be described as weak. They both merit the most careful scrutiny. The applicants' contentions invoke the support of fundamental principles of the Treaty of Rome. The

> Solicitor General relies on sovereign rights over nationality, and on the special provisions of the Common Fisheries Policy.[90]

However, on such a complicated and politically sensitive matter an ECJ judgement could not be expected for around two years (and has not yet been given), which raised the problem of interim measures. The High Court granted an injunction on private law principles preventing the Act being enforced, primarily because damages could not be awarded to the fishing companies even if they were to succeed at the ECJ.[91]

The Crown appealed against the injunction and won in the Court of Appeal.[92] The House of Lords supported the Court of Appeal and held that the courts had no power to suspend the operation of a statute pending the outcome of a challenge to it on the basis that it conflicted with European law, because that would detract from Parliamentary sovereignty:

> Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the applicants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the European Court has been given. If the applicants fail to establish the rights they claim before the European Court, the effect of the interim relief granted would be to have conferred on them rights directly contrary to Parliament's sovereign will

> and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the Court has no power to make an order which has these consequences.[93]

However, the House of Lords conceded that European law may require such a power to exist and, potentially, to be exercised. As a result it made a further Article 177 reference to the ECJ as to whether or not there was such a requirement, and expressed the hope that the application would be treated as one requiring an urgent answer.

The potential constitutional difficulties of giving effect to a final ECJ ruling that the Act was contrary to European law were not addressed directly - these were, after all, interlocutory proceedings. However, all of the courts involved were in no doubt that effect would be given to such a ruling, even though the history of the legislation clearly demonstrates that it was the intention of Parliament precisely to prevent the applicants who challenged the statute from fishing in British waters. In the lower courts it was suggested that the court would "dispense with"[94] or "disapply"[95] the statute. These obiter words are to be regretted if the implication is that in some way the statute can have no effect. It will, irrespective of the ECJ's ruling, continue to apply where non-community nationals are concerned. Lord Bridge in the House of Lords perhaps hinted at the way in which a final ECJ ruling adverse to the U.K. would be applied. He quoted section 2(1) of the European Community Act 1972 in the light of the rule of construction enacted by S.2(4) and concluded that:

> This has precisely the same effect as if a section were incorporated in Part II of the 1988 Act which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable community rights of nationals of any member state of the EEC.[96]

It is submitted that this is entirely in accordance with the analysis of the British approach suggested above, and provides another example of the willingness of British courts to "read in" to a statute wording which will allow Britain to comply with her Community obligations.

The ECJ responded to Lord Bridge's expression of urgency on the interim relief reference. In a ruling based on Simmenthal 1978 which caused no surprise to those familiar with Community law the ECJ held that:

> Community law must be interpreted as meaning that a national court which, in a case before it concerning community law, considered that the sole

> obstacle which precluded it from granting interim relief was a rule of national law must set aside that rule.[97]

However consistent with the ECJ's previous case law and predictable this judgement may have been, it caused a political furore. The Independent newspaper gave it front page status under the headline "EC 'rewrites' British Constitution."[98] In Parliament the Speaker suggested that the decision should be the subject of an early debate. Following expressions of shock by both Conservative and Labour M.Ps.[99] Tory M.P. "Teddy" Taylor thundered:

> This is one of the most frightening things that has happened since the time of King Charles. It means that the EC can suspend any British law it is investigating. It is nonsense for parliament to go ahead passing laws if they can be suspended willy-nilly, if people complain against them.[100]

The storm, as with many political flare-ups, passed fairly quickly once the import of the actual decision, rather than the headlines was appreciated; in particular that the ECJ had not suspended the Act, merely ruled that the House of Lords must, potentially, have the discretion to order appropriate interim relief; although the case is, and will continue to be, cited as another example of unacceptable judicial activism by the ECJ and an erosion of British sovereignty.[101]

After a subsequent hearing, the House of Lords indicated that they had approved in principle the grant of interlocutory relief and an agreed order was prepared.[102] The case demonstrates the British courts willingness to adapt to the requirements of European law, even where established constitutional principles are involved, and the success of its approach in ensuring that political arguments about Britain's relationship with the EC are raised, if not resolved, in the political arena.

5.3.5 **Procedural Difficulties**

The acceptance of the supremacy of Community law and the subsequent de facto limitations on Parliamentary sovereignty (short of express repudiation) by the English courts should not be allowed to obscure the fact that practical and procedural difficulties still arise, although usually at less exalted levels. The English lawyer, judge, magistrate and tribunal member has had a training based on a literal technique of interpretation and application of legislation and rules which exerts a formidable pressure, even subconsciously, on their overall approach. This is particularly true where the relevance of Community law is not immediately apparent or a literal technique can be applied to the material before the examiner irrespective of whether the result accords with a

Community purposive approach. The legal establishment does not always appear to be aware of its responsibilities as regards education. It is astonishing that the "White Book", the Rules of the Supreme Court, which is the English litigation practitioners' bible, still lists the criteria for an Article 177 reference suggested by Lord Denning in 1974,[103] despite the fact that they have been subject to widespread criticism,[104] including implicit criticism by the House of Lords,[105] and that the ECJ has set out its own view of when it is appropriate for a national court to refer a case to it.[106]

The "White Book" has also led to difficulties in respect of the criteria for making an order for the plaintiff in an action to provide security for the defendant's costs. Order 23 confers jurisdiction on the court to exercise its discretion to order security if the plaintiff is "ordinarily resident out of the jurisdiction". However, Article 7 of the EEC Treaty prohibits discrimination based on nationality, and the ECJ has held that this applies if a rule which is not prima facie based on nationality has a similar effect, which a residence criteria may do.[107] Lord Donaldson, obiter without even hearing argument, felt that the rule should be revised to adopt criteria which more closely followed the purpose of the rule[108] and a Committee of the House of Lords was of the view that the rule was clearly contrary to Article 7.[109] When the matter arose for decision the trial judge held that in all other respects security should be granted but that he was precluded from making such an order because the plaintiffs were EC resident and to do so would be contrary to Article 7.[110] In the Court of Appeal Parker, L.J., delivered a lengthy judgement in which he applied a typically literal analysis to the existing case law, both British and European, before concluding that "in the absence of binding authority" it was "impossible" to hold that Order 23 discriminated on the grounds of nationality.[111] In view of the opinions to the contrary (including additionally one of his colleagues in the Court of Appeal) and the House of Lords warning against assuming that European law is ever clear and simple,[112] this would appear to have been an excellent opportunity to obtain binding authority by making an Article 177 reference. This was, of course, the approach adopted by all of the other courts whose ECJ references he so carefully distinguished.

More substantive and procedural difficulties have been thrown up by the English Sunday trading laws. In what, at first glance, seems an area in which Community law has no place the quirks of the British legal system, combined with an unclear and cautious ECJ decision, have led to a plethora of conflicting, technical, civil, criminal and sometimes almost despairing decisions.

The Shops Act 1950 prohibits general trading on a Sunday. There is no real rhyme or reason to the list of exceptions which, it is generally agreed, are anomalous and inconsistent - the usual example given is that it is legal to sell a pornographic magazine, but not a bible, on a Sunday. The Act does not apply to Scotland and is subject to wide regional variations in enforcement policy. Several major retailers, particularly in the Do-It-Yourself field, are seriously affected by the restrictions and have been conducting a political and legal battle against them, often taking a commercial decision to open on Sunday and pay the fines, if any, imposed on them.

In 1989 the ECJ was asked, on an Article 177 reference from the Cymbran Magistrates Court, whether the Sunday trading restrictions were contrary to Article 30 of the EEC Treaty, which prohibits quantitative restrictions, and measures having an equivalent effect, on imports from other member states.[113] The ECJ's case law has established that "trading rules" which are "capable of hindering directly or indirectly, actually or potentially" trade within the EC may be contrary to Article 30.[114]

The defendant in the criminal proceedings, B & Q PLC, gave evidence that Sunday closing led to a drop in sales of around 23%, which were not recovered during the rest of the week. They then argued that, as they obtained about 10% of their stock from other member states, the restrictions on Sunday trading indirectly led to an absolute reduction in imports into the U.K. from other member states. The Magistrates Court accepted this evidence and submitted a reference aimed at establishing the compatibility of the restrictions with Article 30 and, if incompatible, whether the restrictions could otherwise be justified under Community law.

The ECJ in a short and obscure judgement, the application and interpretation of which was not helped by the fact that it declined to adopt the approach of the Advocate General, held that Article 30 could be contravened irrespective of whether the restrictions in question applied equally to domestic and imported goods; that such a contravention would only be justified if the objective of the restrictions was justified under Community law (which the ECJ held to be the case) and the effect on the free movement of goods did not exceed that which was necessary to achieve the objective of the restrictions. This final evaluation was a matter for the national court.

Violation of the Shops Act 1950 is a criminal offence, but the Act is enforced by local authorities with extensive responsibilities in a variety of areas, limited resources and different views as to the appropriate allocation of those resources, which is one of the reasons for the wide variation in the enforcement of the Act. The D.I.Y. stores are large commercial chains with collectively large resources which, in view of the possible rewards, they are prepared to make full use of. They appear to be conducting a guerilla war using the courts with the intention of making enforcement of the Act either impossible or so expensive and time consuming that local authorities conclude it is not worth the aggravation.

In the first half of 1990 (in chronological order of decision) an appeal against a conviction under the Shops Act was rejected on the grounds that the appellant stores failed to satisfy the court, on a balance of probabilities, that Sunday closing had, even potentially, a restrictive effect on imports and that, even if it did, the effects of a blanket ban (irrespective of the inconsistent and anomalous exceptions) do not exceed the effects intrinsic to a prohibition on Sunday trading (a somewhat circular argument);[115] that an application by a Council for an interlocutory civil injunction against Sunday opening was not an abuse of process irrespective of the fact that both pending civil and criminal (i.e. with a higher burden of proof) proceedings would be determined by the decision on Article 30 which would be required by the application for interlocutory relief;[116] that whether or not the Shops Act restrictions are in breach of Article 30 must be determined by the hearing of evidence at trial (in this case civil) and that a local authority could be granted an interim injunction without the requirement of a cross-undertaking in damages (a requirement which would almost certainly have killed the litigation because of the potential cost to the Council);[117] and that a conviction for Sunday trading must be quashed because at the trial (which was prior to the ECJ's decision in Torfaen) the local authorities, as the prosecuting authority and subject to the criminal burden of proof, adduced no evidence as to whether or not the activities of the particular defendant in this case were protected by Article 30.[118]

The situation had become absurd:

> In the numerous prosecutions for Sunday trading a troupe of experts had toured the country giving their views and, as a result, some courts had convicted and others had acquitted. If the question depended on the oral evidence led at the trial, even a decision of the House of Lords need not settle the matter. We should have the absurd state of affairs that the Sunday trading laws would be valid on one day and invalid on another. Summary prosecution would become impossible because

local authorities would have excessive demands made on their resources.[119]

The solution was to hold that the compliance of the Shops Act 1950 with Community law was to be treated as established by social and cultural facts of which the court was entitled to take judicial notice - the "vast mass" of evidence adduced by B &Q was therefore irrelevant. The court's role was restricted to assessing whether or not the method adopted by Parliament, to achieve an objective which was legitimate in terms of Community law, was one which a "reasonable legislature" could have adopted.

With all due respect this approach is an abdication of the court's responsibility. It is inconceivable that a U.K. court would ever characterise the approach to a problem adopted by Parliament as "untenable" or irrational. However far the U.K. courts may go in adapting Parliamentary legislation to conform to Community requirements they do not, and probably never will, claim the power to sit in judgement on the capacity, be it legal or mental, of Parliament to legislate.

However, the problem with which the judge was attempting to grapple is a real one. It is submitted that the best approach was suggested in a short obiter judgement of

Schiemann, J.[120] It has been assumed that the ECJ referred back to the magistrates in Torfaen an obligation to carry out a statistical evaluation of the effect on Community trade of the trading restrictions in that particular case which then had to be balanced against the legitimate objective of the Shops Act. Schiemann, J. argued that this was a misunderstanding of the role of the ECJ, which decided that the application of its proportionality criteria to the Shops Act was a matter for the national court. This was a jurisdictional question and the ECJ, although convinced that the Shops Act restrictions did not contravene Community law "out of a respect for national courts" omitted to say so:

> The fact that the European Court of Justice did not in Torfaen opine that when the national court came to apply the proportionality criteria it would find the answer obvious does not lead me to the conclusion that the answer cannot be obvious. Indeed I think it is.[121]

This contention is supported by the fact that the ECJ declined to respond, on the basis that to do so was unnecessary, to the questions which it had been asked as to possible other "defences" of the Shops Act which might apply if Article 30 was applicable. It is further submitted that if the ECJ had been made aware of the technical, legal and practical difficulties in terms of evidence, civil and criminal burdens of proof, interim relief, enforcement, the

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application of complex law by lay magistrates and uncertainty which its decision had the potential to create it would have explained the implications of its judgement in greater detail. Its failure to do so also suggests that it regarded its decision as one which would be unproblematic when it came to be applied by national courts. The danger of the excess of litigation the Torfaen decision has created is that it may lead to a view of Community law which is more concerned with avoiding or delaying legitimate local restrictions on economic activity, rather than the integration of the European economy for reasons of efficiency and general benefit.

> It is important, however, that litigants should not simply see Article 30 EEC as a panacea to attack every local regulation of economic life willy-nilly. Disputes alleging interference with member-state trade should always have a genuine inter-state element, otherwise Article 30 might fall into disrepute and national courts might become reluctant to refer genuine disputes to the Court of Justice. That would not be a happy result.[122]

At the lower levels of the English legal system there has been a willingness to consider the implications of Community law. Industrial Tribunals and Magistrates Courts whose members are generally not legally qualified (although the Chair of an Industrial Tribunal is usually a lawyer) are the initial forum for many proceedings in which Community law is relevant. A notable example of the receptiveness of these tribunals is Community law was when the Marhsall 1986 case was referred back to the Industrial Tribunal on the question of damages.[123] The tribunal was faced with a finding of sex discrimination contrary to Community law, but the compensation which could be awarded for sex discrimination in English law was subject to a statutory maximum which the tribunal felt had, over time, become wholly inadequate, both as compensation and as a deterrent to employees. Relying on Article 6 of the EEC Treaty and Von Colson 1984, in which, in addition to its support for communitaire construction of national law by national courts, the ECJ had ruled that it was for national law to provide remedies for a breach of Community law but that those remedies must be adequate, the tribunal ignored the statutory limit and awarded damages based on common law principles plus interest.[124]

Overall, it appears that the British legal system and theory has adapted remarkably well in the imposition of this body of "foreign" law upon and into it. The doctrine of Parliamentary sovereignty remains unimpaired in theory, although the practical constrains on Parliamentary action have increased, as was an inevitable and foreseeable consequence of membership of the EC, while in reality the courts ensure that the U.K.'s Community obligations are complied with on the basis of the supremacy of Community law and the statutory binding authority of the decisions of the ECJ. Such difficulties as have arisen stem from the training and socialisation of the British legal community in a system which is based on a literal approach and technique to the law itself - an approach which is frequently at odds with the techniques required by the structure and sources of Community law.

5.4 Agreement To Differ

The ECJ has consistently propounded the supremacy of Community law and its direct effect doctrines on the basis of the autonomous sui generis nature of the Community legal system. If that autonomy is to assist in the attainment of the objectives of the Community set out in the preambles and the early articles of the three Treaties, then the application and effect of Community law must be uniform throughout the Community, hence the need for direct effect. Whether or not the results of this approach are approved or rejected, it must be accepted that the first task of the ECJ was to work out an approach to the relationship between Community and national law. The ECJ's only models in doing so were international law, which, as the Treaties were clearly intended to have an effect within all of the domestic legal systems of the member states and so could not depend on the approach of each individual state's constitutional treaty with regard to international law, was at least in part inappropriate, and the laws of the individual member states, which, whilst valuable lessons could no doubt be learned from each, were incapable of providing a complete or uniform answer acceptable to all. It is therefore, hardly surprising that the ECJ's approach was, and is, predicated on the structure and nature of the Community as a unique entity.

It is equally unsurprising that the courts of several member states, particularly the constitutional courts, reject this theory as an explanation for the application of Community law within their own legal system. National judges depend for their own authority on the constitutional structures of their own democratic political culture; to deny the governing and overriding nature of that structure is to call into question their own source of legitimacy and authority. Furthermore, national judges, unlike the ECJ, have no need to insist on a uniform theory for the application of Community law but can choose to accommodate Community law within their existing individual constitution or constitutional theory. This is what they have done and to suggest that Community law is in permanent crisis because national courts and the ECJ are not ad idem as to why Community law is superior to national and has direct effect is to deny the inevitability of that conflict which will not, if ever, be resolved until there is a degree of European union which is quantitatively different from the current position.

The concentration, then, should not be on why Community law is applied, but on if and how it is applied in national systems, because national courts will continue to be the forum for most applications of Community law:

> The European Court of Justice may stand at the apex of the legal system of the Community, and it surely has a role in the development of a common law, but it is to the decisions of national courts that we must continue to look for the most part. If the benefits of a common law are to be felt by the people, the enterprises, and even the Governments ... of the Community ... then it is homogeneity of decisions, actual and predictable, that we must seek.[125] (emphasis added.)

The simple answer is that Community law, including the vertical direct effect of directives, is, or should be, applied in all member states by virtue of those systems' obedience to the decisions of their own highest courts, as well as by virtue of the Treaties and the ECJ's case law. It may well be that the former is more important in terms of influence and effect than the latter, it is one thing for a court to adopt a hostile attitude to a "foreign" law but another to adopt a similar attitude to a superior indigenous court's rulings. The practical effect is the same.

The only real concern, which so far remains theoretical rather than actual, appears to be the attitude of the German FCC and the Italian Constitutional court to the protection of human rights, and the House of Lords insistence on the right of Parliament to repeal or amend the European Communities Act 1972. These fall-back positions merely represent the recognition of the political reality of the possibility of withdrawal from the Community, or of a political insistence on renegotiating the direction it is taking, if continued membership became, in terms of the domestic constitutional structure to which those courts are subject, unconstitutional. In the U.K. this would take the form of an anti-Community expression of political will of Parliament. In Italy and Germany this would occur if the activities of the Community (in any sphere, although human rights is probably correctly viewed as the only sphere where this is a conceivable scenario) were such as to be impossible to accommodate within the bounds of their constitutions.[126] To argue that the national judicial approach in these cases nullifies the principle of the supremacy of Community law is to deny the reality of the primacy of politics in the Community itself, in the member states and in their relationship with the Community.

ENDNOTES - CHAPTER 5

1. Supra Chpt. 4.

2. The expression derives from French law.

3. Supra 4.1.

4. Case 283/81 CILFIT v Ministry of Health [1982] ECR 3415.

5. Primus Inter Pares. The European and National Courts: Thirty Years of Co-operation (the Florence 177 Project Interim Report, 1988).

6. For an explicit recognition of these factors see H. Rasmussen, "Denmark in Face of Her Community Obligations" (1982) 19 C.M.L. Rev. 601, at 615. A.E. Kellermann, "The Netherlands in Face of its Community Obligations" (1983)20 C.M.L. Rev. 297 merely comments, at 330, that the Netherlands has a reputation for faithful compliance with her international obligations which influences Dutch attitudes towards Community law.

7. A.E. Kellerman, "Supremacy of Community Law in the Netherlands" (1989) 14 E.L. Rev. 175, at 176.

8. Supra n. 7, at 177.

9. K. Lenaerts, "The Application of Community Law in Belgium" (1986) 23 C.M.L. Rev. 253, at 255. See also the comments on judicial reactions at 282. The recent survey of Belgian case law at (1990) 15 E.L. Rev. 73 suggests that Belgian courts remain receptive to Community law.

10. K.D. Kelameus and G.D. Kremlis, "The Application of Community Law in Greece 1981-1987" (1988) 25 C.M.L. Rev. 141; K. Ioannou, "Recent Developments in the application of Community Law in Greece," (1989) 14 E.L. Rev. 461. These two articles form the basis of this section on Greece.

11. See supra 4.2.1.

12. Kerameus and Kremlis adopt this view, K. Ioannou disagrees, supra n. 10.

13. K. Ioannou, supra n. 10 at 469.

14. P. Gjortler, "Community Law in Denmark 1987-1988" (1989) 14 E.L. Rev. 351 at 351. See also the Florence 177 Project Interim Report, supra n. 5, at 51.

15. See Rasmussen supra n. 6 and the citations at supra n. 14.

16. Supra n. 6. He later expanded the arguments put forward in this article into a thesis covering the entire Community in which the perceived activism of the ECJ is severely criticised. H. Rasmussen, On Law and Policy in the European Court of Justice (1986).

17. Kellerman, supra n. 6, at 324.

18. However, one of the objects of the Florence 177 Project is to research the fate of 177 references once they arrive back in domestic legal systems and to investigate pathological cases. Therefore, once the original communitarian impulse of the reference itself has been exerted detailed information concerning non-compliance should become available.

19. The Florence 177 Project supra n.5, at 51. See also F. Murphy (1984) 21 C.M.L. Rev. 741, at 744 where in an admittedly critical case note he comments that the case appears to be "... another example of the loyal attitude adopted by Irish courts to the question of the supremacy of Community law at to the pre-eminence of the Court of Justice within the Community legal order. Indeed, there is no reason to doubt the credentials of the Supreme Court in this regard."
For reviews of Irish case law involving a Community law dimension see (1982) 7 E.L. Rev. 331 and (1986) 11 E.L. Rev. 99.

20. Crotty v An Taoiseach [1987] 2 CMLR 666. See K. Bradley "The Referendum on the Single European Act" (1987) 12 C.M.L. Rev. 301, and J. Temple Lang "The Irish Court Case which delayed the Single European Act" (1987) 24 C.M.L. Rev. 709.

21. Supra 4.2.3.1.

22. Steinike & Weinlig [1980] 2 CMLR 531, at 537. Emphasis in original.

23. [1987] 3 CMLR 225

24. Id, at 254.

25. Id, at 265.

26. Case 70/83. Kloppenburg [1984] ECR 1075.

27. Bunesfinanzhof Judgement of April 25, 1985 (VR 123/84). For a summary in English see (1986) 11 E.L. Rev. 476.

28. Cohn-Bendit. See infra 5.2.4.

29. Bundesverfassungsgericht, Judgement of April 8, 1987 (2 BvR 687/85).

30. Frontini v Ministero delle Finanze [1974] 2 CMLR 372.

31. Supra, n. 23.

32. Supra, n. 30, at 389.

33. See supra 4.2.1.4

34. Decision No. 170 of June 8, 1984 S.P.A. Granital v Amministrazione delle Finanze dello Stato. See the note by G. Gaja at (1984) 21 C.M.L. Rev. 756 for an unofficial English translation of the operative part of the Judgment.

35. Id, at 763.

36. Id, at 764.

37. See infra, 5.3.

38. S.P.A. BECA v Amministrazione delle Finanze dello Strato. Decision No. 113 of April 19, 1985 68 Rivista di Dirito Internazionale (1985) 388. Provincia di Bolzano v Presidente Consiglio Ministri. Decision No. 389 of July 11, 1989, 72 Rivista di Dirito Internazionale (1989), 404.

39. S.P.A. Fragd v Amministrazione delle Finanze. Decision No. 232 of April 21, 1989, 72 Rivista di Dirito Internazionale (1989), 103.

40. See e.g. Case 4/79 Providence Aglicole de la Champagne [1980] ECR 2823; Case 109/79 [1980] ECR 2917.

41. Supra n. 38. Unofficial translation taken from G. Gaja "New Developments in a Continuing Story: The Relationship Between EEC Law and Italian Law." (1990) 27 C.M.L. Rev. 83, at 95.

42. Supra n. 22.

43. See e.g. D.G. Douanes v. Société Valre & Société Weigel, [1975] 2 CMLR 336; Von Kempis v Geldot [1976] 2 CMLR 395.

44. Synducat Général de Fabricarts de Semoules de France [1970] CMLR 395.

45. Id, at 405.

46. Minister of the Interior v Cohn-Bendit [1980] CMLR 543.

47. Id, at 561.

48. Id, at 562.

49. Id, at 562.

50. Supra, n. 40.

51. 10 December, 1986 [1986] RTDE 195.

52. July 26, 1985 [1986] RTDE 158; November 13, 1985 (unreported).

53. Case 112/83 Société des Produits de Mais v French Customs [1985] ECR 719.

54. G. Bebr, "The Rambling Ghost of Cohn-Bendit: Acte Clair and the Court of Justice" (1983) 20 C.M.L. Rev. 439.

55. Supra n. 16 The case is discussed in detail at 310 et seq.

56. Supra, n. 5, at 50.

57. Nicolo [1990] 1 CMLR 173, at 183. See also D. Pollard "The Conseil d' État is European-Official" (1990)15 E.L. Rev. 267.

58. Infra 5.3.4.

59. Bulmer v Bollinger [1974] 2 All ER 1226, at 1231.

60. Shields v E. Coomes (Holdings) Ltd. [1978] 1 WLR 1408, at 1416.

61. "The Incoming Tide." (SEG, 1979) In this lecture Lord Denning spoke very favourably about EC law and the European Convention; which makes his later views even

more surprising. However, it must be pointed out that the publication of those views coincided with a rather unfortunate interview given to the Spectator (August 18, 1990) in which Lord Denning, to the distress of his many admirers, made an astonishing personal attack on Britain's EC Commissioner Sir Leon Brittan, describing him as "... a German Jew telling us what to do with our law."

62. Introduction to "The European Court of Justice: Judges or Policy Makers?" by Gavin Smith (The Bruges Group 1990).

63. British Coal Corporation v The King [1935] AC 500, at 520.

64. Manuel v Advocate General [1982] 3 All ER 786, at 795.

65. Section 3(1).

66. See Lord Diplock infra n. 69.

67. Snoxell v Vauxhall Motors Ltd. [1977] 3 All ER 770, at 777 (EAT).

68. Macarthys Ltd. v Smith [1979] 3 All ER 325, at 329. (C.A.).

69. Garland v British Rail Engineering Ltd. [1982] 2 All ER 402, at 415. (H.L.).

70. Case 14/83 [1984] ECR 1891.

71. Id, at 1909.

72. Supra 4.2.2.7.

73. Supra n. 46.

74. Supra n. 57.

75. [1988] 2 All ER 803 (H.L.).

76. Case 61/81 Commission v U.K. [1982] ECR 2601.

77. SI 1983/1794.

78. The Court of Appeal found in favour of the Employees based on the direct applicability of Article 119 rather than the Regulations. [1987] 3 All ER 756.

79. Supra n. 75, at 814.

80. Supra n. 75, at 807. Emphasis added.

81. Supra n. 75, at 819.

82. [1989] 1 All ER 1134.

83. SI 1981/1794.

84. Supra n. 82, at 1143. The transferee argued that it was supported in its contention by the decision of the Court of Appeal in Secretary of State v Spence [1986] 3 All ER 616 which had been viewed by many practitioners as legitimating the tactics adopted in Litster. Lord Oliver, distinguished the case on the grounds that there was no suggestion of collusion in Spence in which the decision to dismiss the workforce had been taken at a time when there was no immediate prospect of a buyer, although in the event the transfer was completed only three hours after the dismissal of the employees. It does not appear to have been argued that the directive was directly effective because the Secretary of State was involved. However, the Minister was in fact arguing that the Regulations did apply so as to avoid making a payment out of the redundancy fund. On an estoppel rationale for direct effect therefore such an argument would have been unlikely to succeed.

85. Supra n. 82, at 1139 per Lord Templeman. See also Lord Oliver at 1153.

86. [1988] 1 All ER 626.

87. Id, at 635.

88. [1990] 2 All ER 546 (H.L.).

89. See e.g. British Fishing Boats Act 1983which led to case No. 3/87 R v MAFF ex, p. Agegate Ltd. [1990] 1 CMLR 366.

90. R v Secretary of State for Transport ex. p. Factortame Ltd. [1989] 2 CMLR 353, at 374.

91. The court felt it was bound by a Court of Appeal decision. Bourgoin SA v MAFF [1986] 1 QB 716.

92. Also reported at _supra_ n. 90.

93. _Factortame Ltd._ v _Secretary of State_ [1989] 2 All ER 692, at 703.

94. Bingham, L.J. _Supra_ n. 90, at 495.

95. Hodgson, J. _Supra_ n. 90, at 381.

96. _Supra_ n. 93, at 701.

97. Independent Law Report 20 June, 1990.
Times Law Report 20 June, 1990.

98. The _Independent_, June 20, 1990. A follow up editorial the next day was titled "Logical, Inevitable and Right."

99. The _Independent_, June 21, 1990. "Speaker stresses sovereignty fears over EC ruling."

100. Quoted in _The Times_, June 21, 1990 "Law officers prepare reply to EC ruling on U.K. laws."

101. See e.g. G. Smith The European Court of Justice: Judges or Policy Makers? (1990, The Bruges Group), at 13.

102. July 26, 1990 (Not yet reported. Transcript available on Lexis).

103. RSC O. 114, r. 6. n 114/1 - 6/4 and 6/5. (1988). _Bulmer_ v _Bollinger SA_ [1974] 2 All ER 1226.

104. See Hartley, T.C. _The Foundations of European Community Law_ (1988) at 268 _et seq_, particularly at 269 n. 78.

105. _R_ v _Henn_ [1980] 2 All ER 166.

106. Case 283/81, _CILFIT_ [1982] ECR 3415.

107. Case 22/80, _Boussac Saint-Frères_ SA v _Gerstenmeier_ [1980] ECR 3427.

108. _De Bry_ v _FitzGerald_ [1990] 1 CMLR 781.

109. International Access to the Courts: 2nd Report of the Select Committee on the European Communities. HC (1987-88) 7, at para 39.

110. *Berkeley Administration Inc.* v. *McClelland* [1990] 1 CMLR 193.

111. [1990] 2 CMLR 116. In the writer's opinion some of the reasons given for distinguishing the ECJ's case law were extremely dubious. For example the judge equated choice of residence - a unilateral choice - with the agreed - i.e. between two independent entities - currency specified in a contract to distinguish the case on German procedural law which is most closely analogous to this situation, at 125. He also stressed that a German plaintiff resident in the U.K. would not be liable for security whereas an English national living in Germany would, at 119. With all due respect that is precisely the kind of *prima facie* objectivity that the concept of covert discrimination - an apparently objective criteria which has a disproportionate, and therefore discriminatory, effect - is intended to discover.

112. *R* v *Henn* *supra* n. 105.

113. *Torfaen B.C.* v *B & Q plc* [1990] 1 CMLR 337.

114. Case 8/74 *Dassonville* [1974] ECR 837.

115. *Wellingborough B.C.* v *Payless D.I.Y. Ltd.*
Kettering B.C. v *W.H. Smith Do-It-All Ltd.*
[1990] 1 CMLR 773.

116. *Stoke-on-Trent CC and Norwich CC* v *B & Q plc* 116. [1990] 2 CMLR 501.

117. *Kirklees B.C.* v *Wickes Building Supplies Ltd.* [1990] 2 CMLR 501.

118. *W.H. Smith Do-It-All Ltd. and Payless D.I.Y. Ltd.* v *Peterborough CC* [1990] 2 CMLR 577.

119. *Stoke-on-Trent CC and Norwich CC* v *B & Q Plc* The Independent Law Report 20 July, 1990.

120. *Supra* n. 118, at 607.

121. *Id* at 611.

122. Gormley, L.W. Case Note (1990) 27 *C.M.L. Rev.* 141, at 150.

123. *Marshall* v. *Southampton Area Health Authority (No. 2)* [1988] IRLR 325.

124. The decision was overruled on appeal as to the award of interest but the damages point itself, was not appealed, much to the chagrin of many employment practitioners.124.

125. J.A. Jolowicz. "The Case for Applied Comparative Law." In M. Cappelletti, ed. New Perspectives for a Common Law of Europe. (1978), at 264.

126. See H.G. Schermers, "The Scales in Balance: National Constitutional Court v Court of Justice" (1990) 27 C.M.L. Rev. 97 for an interesting approach to the position of the FCC and the Constitutional Court. He argues that this is a recognition of the existence of international human rights which cannot be violated and which courts are obliged to protect. His solution to the apparent conflict is for the EC to commit itself more formally to the human rights protection contained in the European Constitution.

6. AN ASSESSMENT

6.1 The Problem of Legitimacy

The attempt to establish objective criteria for the evaluation of the legitimacy of judicial activity is one of the most interesting, and least successful, exercises in jurisprudence. However concealed it may be, in the final analysis an assessment of any judicial decision boils down to whether or not the analyst agrees with it. Even Rasmussen is forced to conclude that no normative theory of the interpretation of Community law is possible, and that his attempt is merely to produce a more objective approach to the definition of the boundaries of legitimate judicial activism.[1]

The difficulties inherent in any such attempt are compounded by the unique nature of the Community and its law, and, whatever may be thought of the ECJ's use of that status, its existence cannot be denied. The utility of the common tools of analysis are reduced in power because they were designed for a single coherent system, rather than one which draws on sources from all over the world, and from twelve differing systems in particular; Griffiths, "nightmare", of conservative and homogenous judges frustrating elected representatives while protecting their own class interests, collapses under the weight of its own premises when the last word which could be used to describe the political culture, training and socialisation of the members of the Court is homogenous; Dworkin's "noble dream" of judges teasing out the principles inherent in the law cannot assist a court with over twelve kinds of law and, therefore, principles to choose from.[2]

Furthermore, the role of the judge in a democratic system, and judges' individual perception of that role, which determine whether or not judicial decisions are "legitimate", are not fixed reference points. They will alter as the cases submitted to the court alter, which will reflect the activities of the legislature and the public perception of which types of dispute are suitable and appropriate for judicial resolution:

> The line between proper and improper judicial roles is constantly in need of being redrawn as circumstances change (such as the comparative legitimacy and willingness of other branches of government to develop the law) ... Each generation will need to revise the rules of the game.[3]

However, this does not mean that the attempt to explore the boundaries is futile. The debate itself may suggest how, and why, acceptable judicial behaviour changes over time, and why a particular approach may be viewed as legitimate, accepted and approved in relation to one area of law but not in another. Finally, by analysing what judges do and why, it may be possible to suggest changes in the methodology they use and to open up the process to better informed, higher quality debate, which may, in turn, because of greater understanding of the process, lead to fewer disagreements between judiciaries and those in other spheres of political, social and economic life as to what was the "right" decision.

6.2 **The Primacy of Politics**

Lawyers have a tendency to believe that the law is the sole restraining influence on unacceptable behaviour and that its influence cannot be overestimated. The great fear of those who accuse the ECJ of unacceptable activism is that at some point the political and other institutions of the Community and/or the member states will reject the authority of the ECJ, and, therefore, the law, because its jurisprudence will be perceived as illegitimate as a result of its activism.[4]

However, this ignores the reality that in Western Europe democratic and legal theory accepts that the ultimate legal power, to amend constitutions, pass statutes etc., lies with political, not judicial, actors. The ECJ could not have achieved anything, let alone its increasingly sophisticated constitutional law without at least the tacit acceptance of the relevant political interests:

> Where the political will to do something is strong, the law has an easy ride. Where political opposition is strong the law is bound to fail. But there is a vast grey area in which there are no very strong political interests either way. Governments may not like developments, but they do not feel sufficiently strongly to oppose them. ... This vast area of relatively low political intensity is in many ways the true realm of the law and of the judiciary.[5]

There had to be some relationship between Community law, which was clearly intended to be binding on the member states, and, so far, the relevant political establishments have been happy to allow the ECJ to develop and define it - even if they have not always been ecstatic about the results. In fact, politicians tend to be more pragmatic and practical about the requirements of effective and functional institutional systems than lawyers. It may well be that Pierre Pescatorre's approach:

> ... legal rules, by their very nature, have a practical purpose. Any legal rule is devised so as to operate effectively ... If it is not operative, it is not a rule of law. The task of lawyers is therefore not to thwart effects of legal rules, but to help in putting them into operation. In other words, practical operation for all concerned, which

> is nothing else than "direct effect," must be considered as being the normal condition of any rule of law. The non-operation of a rule of law appears thus to be not an ordinary phenomenon, but a real antinomy in the legal system. In other words, "direct effect" must be presumed, it has not to be established a priori;[6]

would be more understandable and appealing to a politician than a technical legal explanation that direct effect was specifically described in a Treaty thirty years ago. Conversely, legal arguments about the wording of Article 189 suggesting that the activities of the ECJ are illegitimate, which may seem to be the crux of the matter to a lawyer, will only be of interest to the politician if the practical effects of the ECJ's decisions are so objectionable to them that they wish to challenge those decisions and are looking for supporting material. If this is the case then the absence of legal support would not prevent an attack anyway.

6.3 **Article 189 Revisited**

The starting point for most attacks on the ECJ is that the Treaties do not provide for the supremacy of Community law over national law or the doctrine of direct effect; in particular that Article 189 does not specify that directives can have any effect in domestic legal systems without implementing measures being taken by the member states. All of this is undeniable.

The ECJ's response is that Article 189 does not provide for the supremacy of national law over Community law or that Community law, including directives, cannot have immediate effects in domestic legal systems. It is the nature and structure of the Community, which is based on non-discrimination (i.e. uniformity of application of rules) and the rule of law (i.e. binding and effective law), which shows that the Treaties require Community law to take precedence, and Community acts to have practical effects. This approach, which necessarily leads to increased integration as Community competence expands and the amount of Community legislation increases, is supported by the Preambles to the Treaties and, it is submitted, the political genesis of the Communities described above in Chapter 2, which indicates that the architects of the Community had political, as well as economic, integration as a primary goal when designing the Community structure.[7]

However, when the function of Article 189 and its rationale are considered, a much more robust rejoinder to the critics of "direct effect" is possible. Article 189 is not an article which sets out the principles of Community law and details how it is to be applied and interpreted. It is a mechanical article, describing the options available to the political institutions to achieve the objects which they have agreed. Directives are not an inferior kind of legislation to regulations, the are merely different, and were intended to overcome some of the particular problems involved in trying to achieve uniformity of effect in a number of different legal cultures:

> If ... we direct our attention not to the study of the actual phenomenon of existing legal systems but to the techniques necessary for the deliberate introduction by convention, directive or other legislative means, of simultaneous changes in several legal systems so as to bring them closer together in their operation, we must recognise that we are dealing with a number of different legal machines whose internal workings are not the same. It is not to be expected that the insertion into different legal systems of a single text will produce identical or even similar results in all those systems any more than it is to be expected that the addition of a litre of green paint to four litres of yellow will give us the same colour as the addition of the same quantity of the same paint to four litres of red.[8]
>
> We come back ... to the critical importance ... of taking into account the different legal machines which have to be adjusted so as to produce similar results in similar cases. We also come ... to the idea that better results are likely to be achieved by trying to reach agreement at the international or supra-national level not upon a form of words to be incorporated into national law, but upon a set of objectives to be achieved, leaving to each national system the actual details of technique and implementation. This is, of course, the way in which Directives of the E.E.C. are supposed to work ...[9]

Once the point of issuing a directive, rather than a regulation, is appreciated - that is, to leave in the hands of those most qualified to succeed in achieving the agreed objective within the structure of their particular legal system, in circumstances where an agreed text is unlikely to achieve that objective, not to give member states a discretion as to the objective itself or to deny the binding force of the obligation undertaken by the member states - it becomes clear that Article 189 cannot bear the weight of the exclusionary nature attributed to it. The absence of a specific default provision does not imply that a default by a member state has no consequences.

On the failure of a member state to implement a directive, a situation that the ECJ admits raises special problems,[10] the ECJ is required to pronounce on the consequences of that failure. The member state has failed to avail itself of the opportunity to achieve the agreed object in the most effective way, but the Community object is not to "punish" the member state but is to achieve the agreed objective. Therefore, as Pescatorre suggests, the issue becomes one of justiciability.[11] If the directive, or any part of it, is sufficiently precise to allow national courts to utilise the text to achieve all or part of its objective, even though use of the text of the directive will be less effective than the result of the application of proper implementing legislation, it will have direct effect. If not, then direct effect will be denied.

Once the purpose and design of the regulation/directive distinction in Article 189 is properly appreciated, then literal arguments based on the wording of the article lose much of their superficial attractiveness. Once the ECJ is shown to have given effect to the intention behind Article 189 itself, rather than relying on the overall intention of the Treaty design, it is difficult to contend that it has acted illegitimately.

6.4 **Defrenne - Judicial Legislation?**

Professor Hamson accuses the ECJ of usurping the legislative function in its decision to refuse to allow back dated claims following its ruling on the direct effect of the equal pay provision of Article 119. This declaration of law as from a specific date was a power claimed by the ECJ which was the hallmark of a legislative body.[12]

However, it is no longer tenable to argue that courts do not make law, and Professor Hamson would not seek to do so. Yet he argues that when a court does make law (as the

ECJ was indisputably doing in this decision) the effects in the legal system affected and in the case of the Community legal systems, should be left to the vagaries of rules regarding periods of limitation. In fact, this does not equate with pronouncing law de novo from the date of the judgment, but pronouncing it retroactively from whatever date in the past the domestic legal system at issue specifies. However strong the belief in Europe may be that judges should not legislate, it is submitted that the belief that legislation should not be retroactive is stronger.

The ECJ's decision to limit the temporal effect of their ruling was clearly made with an eye on the potentially devastating financial consequences for member states of millions of back dated claims by women throughout the Community. Not only might the practical consequences threaten the financial stability of many organisations, but the effect of that might have been to take the matter into the area of high "political intensity" which might lead to a serious conflict with the ECJ's political masters. Letting discretion be the better part of valour the ECJ again established an important principle, whilst keeping the consequences of the decision within the bounds of political acceptability. These factors and considerations demonstrate precisely Simon Lee's prescription for one of the three factors which should influence judicial decisions; the present and future consequences of the decision, which are to be considered in the light of the consequences of the possible alternative decisions and the consequences which are the most desirable for the law to promote.[13] Analysed in this way the ECJ came up with the optimum solution - the establishment of an important principle without any adverse consequences. Indeed, contrary to Professor Hamson, it appears that the ECJ arrived at their decision precisely because of their perception of the effects of their decision in the real world, rather than their promotion of a legal fantasy land.[14]

6.5 A Startling Triumph

The ECJ's conservative approach in Marshall, denying the possibility of any horizontal direct effect of directives, has already been discussed.[15] From the point of view of the uniformity of Community law the decision is inconsistent and regrettable, directly effective Treaty articles have horizontal direct effect despite the injustice to the individual left exposed by their government's failure to comply with their Community obligations. It also reduces the pressure on actors in the domestic legal systems of the member states to familiarise themselves with Community law and, as a result, be better prepared to utilise it, because the direct impact of

Community law on the majority of lawyer's clients will not be as great. The lawyer can wait for the implementing legislation without the need to appreciate the Community law dimension (always assuming that the legislation is adequate).

However, viewed in the light of the Conseil d'État's resistance to giving any direct effect to directives[16] the Marshall decision, combined with the development of the Von Colson principle[17], can again be explained as an example of the ECJ maximising its possible return by avoiding further conflict and making its remaining jurisprudence on direct effect more acceptable to the Conseil d'État. To recapitulate, the Conseil d'État rejected the ECJ's case law on the direct effect of directives, even when horizontal direct effect was not at issue. The ECJ developed an approach, suggested by Lord Diplock, the effect of which was to place more responsibility for the application of Community law on national courts, thus increasing their autonomy by instructing them to utilise interpretative techniques to apply national law in accordance with the requirements of Community law, rather than be compelled to invalidate conflicting national law. It then declined to expand the effect of directives in national law despite the support of its own previous case law.

If the ECJ considered these developments and the possible consequences of its decision it would have had to evaluate several factors. To deny horizontal direct effect to directives would damage the uniformity of application of Community law throughout the Community and create market distortions and other anomalies. On the other hand, the Conseil d' État's defiance meant that binding directives which had not been implemented by France were not being given any effect in French administrative courts. This in itself was damaging the uniformity of application of Community law, the political and judicial harmony of the Community, the ECJ's own authority and depriving residents of, and traders with, France of the Community protection to which they were entitled. The ECJ might also have believed that a gesture of restraint might mollify the Conseil d' État, and, as a result of the development of the Von Colson principle, the detrimental impact of such a decision had been diminished, whereas a further assertion of expanded direct effect for directives would antagonise it. On this analysis the ECJ would be hoping, in return for its gesture of restraint, for a modification of its own position by the Conseil d'État. If this was the strategy, it succeeded.[18]

The decision of the Conseil d' État in Nicolo was in itself a boost to the authority of the ECJ. Throughout the

Community of twelve nations no court persists in maintaining resistance to one of the ECJ's most controversial doctrines. However, the most startling triumph for the ECJ was that the *Conseil d' État* appeared "(reading into its laconic utterance all the undertones proposed by Frydman C.G.)"[19] to accept *in toto*, albeit in relation to its own constitution rather than Community law, the very jurisprudence which the E[illegible] relies upon for its own approach to the relationship between Community law and national law. It will be extremely difficult for the *Conseil d' État* to characterise that approach as illegitimate in the future.

The *Commissaire du Gouvernement* was in no doubt that the application to annul the French 1989 European Elections was manifestly ill-founded, and could be disposed of without any need to consider the relationship between the French constitution and Community law. The fact that he insisted on doing so demonstrates again the propensity of landmark judgements to come to fruition without any absolute necessity for the decision. He was careful not to suggest that the *Conseil* had erred in its previous case law:

> On the contrary, I believe that they conform in every respect to strict principles and traditional orthodoxy. Nevertheless, it seems to me that a different reading of Article 55 is certainly

> equally conceivable in law and is infinitely preferable from the viewpoint of expediency. (emphasis added)[20]

Then, in a passage remarkably similar to the arguments used by the ECJ to rebut criticism based on Article 189, he says:

> ... your case law leads in practice to removing an effective sanction of any kind for a violation of Article 55. It is inconceivable that a constitutional provision should remain a dead letter in this way on the ground that no court considers it has jurisdiction to secure compliance with it ... The opposite conclusion, which would result in permitting Parliament to frustrate with ease the actual application of any international measures - particularly those of the Community - which it considers inappropriate is hardly justifiable in the light of Article 55. The perverse effects which would follow in practice from the absence of any judicial control of law are readily apparent.[21]

Next he noted that the relationship between international law, particularly Community law, and domestic law had undergone changes which national courts must recognise. Again this passage accords with the well established position of the ECJ:

> It cannot be repeated often enough that the era of the unconditional supremacy of internal law is now over. International rules of law, particularly those of Europe have gradually conquered our legal universe, without hesitating furthermore to encroach on the competence of Parliament ... In this way certain fields of our law such as those of

> the economy, employment or protection of human rights now very largely originate from genuinely international legislation ... France cannot at one and the same time accept restrictions on sovereignty and uphold the supremacy of its own law before the courts: there is an element of illogicality here which, it seems to me, your 1968 decision may have underestimated.[22]

Nor does he flinch from acknowledging that the very fact of Community membership has political and democratic implications that the courts must bear in mind when considering the effect of Community law in the domestic system:

> ... although the inclusion in international treaties of principles which in reality have constitutional force does raise a legal difficulty, nonetheless it arises directly as a result of the political will expressed by Parliament and the executive when they ratified those agreements. Therefore I do not see on what grounds a court could rely for refusing to draw all the automatic conclusions from the entry into force of the agreements in question.[23]

Large extracts from this case have been quoted to demonstrate the remarkable congruence between the approach of the Commissaire, which appears to have been adopted by the Conseil, with the well developed jurisprudence of the ECJ in a Community, rather than a domestic constitutional, context; particularly when it is remembered that reference is also made to the use of interpretative techniques to avoid conflicts between French law and treaty law (i.e. the Von Colson principle).[24]

The Commissaire was also heavily influenced by the convergence of the case law of the European Supreme Courts.[25] It is submitted that this convergence is due primarily to the effect of the jurisprudence of the ECJ and the Article 177 procedure, with its resultant multilateral judicial dialogue, understanding and communication. The Von Colson principle is a prime example of how the ECJ can utilise the Article 177 procedure to adapt, develop and Europeanise a principle, approach or concept drawn from the legal system of one or more member states. This is one of the Community legal system's great strengths.

The Conseil's submission to the ECJ's authority, and its remarkable acceptance of the ECJ's jurisprudence in a domestic context, together with the earlier acquiescence of all of the other courts of the Community is a testimony to the effectiveness of the ECJ's low-key, non-confrontational approach. Lacking an effective means of enforcement it has apparently ignored acts of defiance from national courts, persisting in expounding its own view of the relationship between national and Community law whilst, where necessary, exploring alternative ways of achieving its objects but maintaining the integrity of the system, until its persuasion and persistence finally led to full acceptance, in practice if not in theory, of the constitutional principles it has developed for the Community:

> Outside the limelight, however, the Court of Justice of the Community has done its job, and it has done it with remarkable success. Its quiet persistence, its fairness, its combination of reticence and assurance, the sheer intellectual quality of its rulings have all contributed to gaining it that respect which is even more necessary a prerequisite of organized justice in the semi-vacuum of the European Community than it is in nation-states.[26]

6.6 **The Past and the Future**

As has been pointed out the role of the courts in a given legal system changes over time, partly in response to changes in the behaviour of the other institutional and political organs which make up the overall system, partly as perceptions of the appropriate judicial role in given situations change. This has been particularly true of the ECJ because the nature of the Community renders its political institutions more directly exposed to changing global economic and political developments than individual national states are perceived to be. The ECJ's role appears to have passed through various stages; in the 1950s and 1960s the establishment and development of the Community legal system as an independent entity was the prime concern, whereas in the 1970s the concentration was on empowering individuals to benefit from the Treaties by allowing them to rely on protection derived from the general objectives of the Communities as their individual rights. These developments are characterised as the institutional stage - where the institutional structure is defined and its possibilities explored - and the instrumental stage - where the law is used as an instrument of social policy to push the Community towards its defined goals. Now, it is suggested that limits of both institutional and instrumental approaches to law are being recognised with a consequent trend towards a minimalist approach, in which the ECJ does merely attempt, as far as possible, to avoid creating universal constitutional principles to promote the Community, and to adjudicate solely on the question before it.[27] Koopmans suggests that these stages mirror similar developments in other Western legal systems and evidence a changing perception of the possibilities and limitations of law as a catalyst of social change.[28] Ralph Dahrendorf adds a political perspective when he explains that in the 1970s, when the ECJ was at its most instrumental, the Community as a whole was stagnating.[29] This was the period of the oil crises, which caused an instinctive reversion towards individual nationalist responses by member state governments, and coincided with the achievement of the customs union, following which the Commission had no politically mandated policy objective to strive for and, as a result, all but ceased to function. This led to the ECJ adopting an activist approach with the intention of making those rules which were available to it effective. It built on its existing jurisprudence concerning the supremacy of Community law, developed the doctrine of direct effect for Treaty articles, directives and decisions and attempted to ensure that the Community moved at least some way towards the additional objects mentioned in the Treaties. However, by the end of the 1970s, the inherent limits on judicial development of a political and economic Community were apparent, the basic constitutional principles of the Community had been expounded and all that remained was to fine tune and delimit them. In 1980 Dahrendorf commented:

> The European Communities have been an important invention; their institutions have done a remarkable job. But in the years to come, progress should not be expected from the text of the Treaties or from the European Court. In the years to come progress will have to be political in the first instance. If such progress does not happen, the law cannot help; if it does, the law, and the judiciary, will have played an important part in the process.[30]

This was to prove prophetic. The Accession of Spain and Portugal provided a boost to the political impetus of the Communities, but global events and, in particular, the relative strength of the American economy, with its vast market, provided the stimulus for the revised political and economic objectives agreed in the Single European Act 1986.[31] Whatever the formal legal protection available to recalcitrant member states it is now clear that the SEA has provided a major boost to the process of integration. There has developed a political and commercial momentum which member states are reluctant to be seen to be obstructing.

On top of this come recent developments in Eastern Europe. The political debate within the EC as a result of the reunification of Germany, which may turn the biggest contributor to the Community budget into a net recipient, and the disintegration of the Soviet bloc has caused passionate arguments about the pace, depth and breadth of further integration and/or expansion of the Community and the proposal for Economic and Monetary Union (EMU). What is not in doubt is that this debate, and any subsequent decision(s), is political in nature and cannot be influenced in any way by the ECJ.

The ECJ has helped make the Community work and has established a constitutional system which will serve the Community for many years to come. In the process it has persuaded the national courts of the member states to give effect to the requirements of its jurisprudence, if not to accept the theory, and it has created and protected fundamental civil and social rights for all EC citizens. However, it is difficult not to agree that now the constitutional castle has been built it should be defended by legal craftsmen, rather than social engineers.[32]

ENDNOTES - CHAPTER 6

1. H. Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court." (1988) 13 E.L. Rev. 28, at 34.

2. The terminology is taken from S. Lee Judging Judges (1989). J. Griffith, The Politics of the Judiciary (4th ed. 1990). R. Dworkin, Taking Rights Seriously (1978) and A Matter of Principle (1986).

3. Lee, supra n.2, at 203.

4. H. Rasmussen On Law and Policy in the European Court of Justice (1986), at 8.

5. R. Dahrendorf. "Law and Politics in the European Community" (1980, SEG), at 25.

6. P. Pescatorre, "The Doctrine of "Direct Effect": An Infant Disease of Community Law," (1983) 8 E.L. Rev.6. 155, at 155.

7. Supra Chapter 2.

8. J.A. Jolowicz, "The Case for Applied Comparative Law." In M. Cappelletti. ed. New Perspectives for a Common Law of Europe (1978) 237, at 244.

9. Id, at 254.

10. Case 8/81, Becker [1982] ECR 53.

11. Supra n. 6, at 174.

12. C.J. Hamson "Methods of Interpretation - A Critical Assessment of the Results," in ECJ Judicial and Academic Conference 1976 II, at II-15.

13. Supra n. 2, at 10. The other two factors are past law and judicial role perception.

14. Supra n. 12, at II-18.

15. Supra 4.2.2.7.

16. Supra 5.2.4.

17. Supra 5.3.2.

18. Supra 5.2.4.

19. [1990] 1 CMLR 173, at 173.

20. Id, at 179.

21. Id, at 182.

22. Id, at 184.

23. Id, at 189.

24. Supra 5.2.4.

25. Supra n. 19, at 185.

26. Supra n. 5, at 21.

27. T. Koopmans, "The Role of Law in the Next Stage of European Integration," (1986) 35 I.C.L.Q. 925.

28. Id. For an earlier, more wide-ranging discussion along the same lines see T. Koopmans "Legislative and Judiciary - Present Trends." In M. Cappelletti ed. Supra n. 8, at 309.

29. Supra n. 5, at 17-19.

30. Id, at 29.

31. M.E. Elling, "The Emerging European Community: A Framework for Institutional and Legal Analysis," (1990) 13 H.I.C.L.R. 511, at 522.

32. Supra n. 27, at 931.

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